Supreme Court, U.S.
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No. (1)

In The

# Supreme Court of the United States

FRED P. GILBERT,

*Petitioner,*

v.

ROBERT S. POST,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Civil Appeals, Division III, Of The State Of Oklahoma**

## PETITION FOR WRIT OF CERTIORARI

FRED P. GILBERT
*Pro se Petitioner*
830 Beacon Building
406 S. Boulder
Tulsa, OK 74103
(918) 583-4276

## QUESTIONS PRESENTED

The constitutional issue presented is whether a State Guardianship Judge has the authority, consistent with the Impairment of the Obligation of Contracts Clause of the United States Constitution (Art. I, Sec. 10, Para. 17), to "disapprove" or otherwise to impair any obligation contained in any one or more of the contracts between Ms. Sweetin and counsel (reproduced at Appendix 60, 62, 63 and 67 hereto) – especially when, under established Oklahoma law, an alleged incompetent (or "incapacitated person") retains sufficient competency and capacity to *contract* to obtain "necessaries," which in Oklahoma include legal representation for the defense of the citizen's *liberty* (also under Oklahoma law a "necessary"). Since the written contract(s) between Ms. Sweetin and counsel, for counsel to defend Ms. Sweetin's liberty against the Guardianship charges then filed and pending against her, were, under Oklahoma law, statutorily lawful *contracts*, then the Federal "Question Presented" can be stated as:

1. Whether the lawful *contract* between Ms. Sweetin and counsel, for counsel's agreeing to defend Ms. Sweetin against the incompetency charges being levelled against her, may be impaired or defeated by a Guardianship Judge's purported authority to nullify that contract, in whole or in part, under the provisions of 30 O.S. 4-403(C), which supposedly vests in the Guardianship Judge a near absolute-power to

**QUESTIONS PRESENTED** – Continued

"disapprove" of the contract(s) as a whole, or any significant portion thereof, such as Ms. Sweetin's contractual agreement and promise to pay unto counsel, for counsel's services thus promised and actually performed, at counsel's standard (and quite modest, and eminently reasonable) hourly rate, of $150 per hour, plus out-of-pocket expenses, especially in the conspicuous failure of any interested party to the Guardianship litigation to object thereto – or indeed, even if some relative of Ms. Sweetin's, or some other supposedly interested party, *had* objected to the Sweetin-Gilbert contractual relationship. And this question, in turn, reduces to:

2. May the State of Oklahoma, whether pursuant to 30 O.S. 4-403(C), or some similar legal enactment, authorize a Guardianship Judge to impair any or all of the corresponding contractual obligations between an elderly or aged lady, and the attorney of her own choice, pursuant to which counsel was contractually hired to furnish the "necessary" of legal representation and services to defend the lady's liberty (also a "necessary"), upon and for the consideration of compensation specified in the contract(s), by the expedient of simply "disapproving" of the said compensation/consideration, either in whole or in part?

## LIST OF PARTIES

By order of the Oklahoma Supreme Court, entered on October 22, 2007, in Oklahoma Appeal No. 103,156 (unreported), the Oklahoma Supreme Court ruled that Messrs. Post and Gilbert are the only Parties to this instant appellate-level litigation.

Therefore, the only Party hereto, other than the Petitioner (Fred Gilbert) himself (formerly and up until her death, at age 92, on December 18, 2005, Ms. Sweetin's defense lawyer), is Mr. Robert S. Post, the Special Administrator of Ms. Sweetin's Probate Estate, and whose address appears on the Certificate of Service hereto.

Under Oklahoma practice, the original District-Court style of the litigation is usually retained (to some degree).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... iii

TABLE OF AUTHORITIES ..... vi

CITATIONS TO DECISIONS BELOW ..... 1

JURISDICTION ..... 3

LEGAL PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE ..... 5

REASONS FOR GRANTING THE WRIT ..... 19

CONCLUSION ..... 36

APPENDICES

The Opinion of the Oklahoma [intermediate] Court of Civil Appeals, Appeal No. 103,156 ....App. 1

The Denial of the Petition for Rehearing, Appeal No. 103,156 .....App. 16

The "Order Awarding Attorney's Fees," *In re Mary Marie Sweetin,* Rogers County District Court, Case No. PG-2004-22 .....App. 17

The "Order Setting Hearing" .....App. 24

The "Order" .....App. 26

The Oklahoma Supreme Court's Denial of Certiorari, Appeal No. 103,145 .....App. 31

Partial Transcript .....App. 32

The Petition for Certiorari To the Oklahoma Supreme Court .....App. 39

TABLE OF CONTENTS – Continued

Page

The Petition for Rehearing ..... App. 42

The Brief on Appeal ..... App. 44

The Petition in Error ..... App. 47

Brief in Support of Motion for New Trial ..... App. 49

Motion for New Trial ..... App. 52

Contract for Legal Services ..... App. 54

[untitled] declaration ..... App. 56

Statement ..... App. 57

Contract for Legal Services ..... App. 61

Opinion, *In re Glenn O. Young* ..... App. 63

# TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

Article I, Section 10, Paragraph 1 .....*passim*

FEDERAL STATUTES

28 U.S.C. 1257 .....3

28 U.S.C. 2104 .....3

OKLAHOMA STATUTES

12 O.S. 3235 .....16

12 O.S. 3235(D) .....16

15 O.S. §§ 16-27 .....20, 22

30 O.S. 3-107 .....25

30 O.S. 3-107(D) .....26

30 O.S. 3-107(E)(2) .....26

30 O.S. 3-108 .....16

30 O.S. 3-110(D) .....9, 11, 26

30 O.S. 3-219 .....27

30 O.S. 4-403 .....4

30 O.S. 4-403(C) .....5, 29, 32, 34

30 O.S. 4-761 .....18

TABLE OF AUTHORITIES – Continued

Page

CASES

*Appeal of Barnett,* 122 Okla. 169, 252 Pac. 410 (1927) ..... 20, 21

*Boswell v. Schultz,* 175 P.3d 390 [2007 OK 94] (Okla., 2007) ..... 16

*Bradburn v. McIntosh,* 159 F.2d 925 (10th Cir., 1947) ..... 21, 22

*Estate of Bradshaw,* 607 P.2d 578 (Okla., 1980) ..... 21, 24, 25

*Estelle v. Smith,* 451 U.S. 454 (1981) ..... 16

*Faretta v. California,* 422 U.S. 806 (1975) ..... 13

*Gideon v. Wainwright,* 372 U.S. 335 (1963) ..... 35

*McCullough v. Mathews,* 918 P.2d 25 [1995 OK 90] (Okla., 1995) ..... 16

*Miranda v. Arizona,* 384 U.S. 436 (1966) ..... 35

*Piette v. Bradley & Leseberg,* 930 P.2d 183 (Okla., 1990) ..... 28

*Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424 (1985) ..... 28

*Towne v. Hubbard,* 977 P.2d 1084 (Okla., 1999) ("*Towne I*") ..... 27, 28

*Towne v. Hubbard,* 3 P.3d 154 (Okla., 2000) ("*Towne II*") ..... 13, 27, 28

TABLE OF AUTHORITIES – Continued

Page

*United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977) .....34

*In the Matter of Glenn O. Young*, Okla.App., Div. 4, No. 64460 (Nov. 1, 1988).....6

COURT RULES

U.S. Supreme Court Rule 10(c).....3

U.S. Supreme Court Rule 13(1) .....3

U.S. Supreme Court Rule 13(2) .....3

Oklahoma Supreme Court Rule 1.20.....2

Oklahoma Supreme Court Rule 1.24.....2

Oklahoma Supreme Court Rule 1.170.....2

Oklahoma Supreme Court Rules, O.S., Title 12, Ch. 15, App. I.....2

Federal Rule of Civil Procedure No. 35 .....16

## CITATIONS TO DECISIONS BELOW (ALL UNREPORTED)

The decisions below, which Petitioner herein assails as rendered in violation of the Impairment of the Obligation of Contracts Clause to the U.S. Constitution, and none of which decisions is reported, include (in chronological order) the following:

1. The first violation of the Impairment Clause complained of herein took place on June 2, 2005, as reflected at pp. 37-39 of the Transcript of that date [Appendix 32, at 34-37], later memorialized in the "Order" (at p. 3, para. 4 thereof) of June 10, 2005 [Appendix 26, at 20], by the District Court of Rogers County, Oklahoma, per the Hon. Terry McBride, Associate District Judge, presiding, in Case No. PG-2004-22, *In the Matter of the Guardianship of the Person and Estate of Mary Marie Sweetin, an Alleged Incapacitated Person*.

2. The second instance of the violation complained of herein occurred in the same Case and Court, in the "Order Setting Hearing," of September 15, 2005 [Appendix 24].

3. The third instance of the violation complained of herein occurred in the same Case and Court, in the "Order Approving Attorney Fees," on February 13, 2006 [Appendix 17, at 19-21].

Thereafter, a timely and proper direct Appeal (No. 103,156) was taken from the said Guardianship

Case to the Oklahoma Supreme Court (and later delegated down to the Court of Appeals).[1]

4. The fourth instance of the violation complained of occurred in the Court of Appeals, District III, of the State of Oklahoma, in the "Opinion" of July 11, 2006 [Appendix 1].

5. The fifth instance of the violation complained of occurred in the same Case and Court, in the "Denial of Rehearing," filed August 29, 2008 [Appendix 16].

6. The fifth (and last) instance of the violation complained of occurred in the Oklahoma Supreme Court's discretionary denial of certiorari, on February 2, 2009 [Appendix 31].

In all this sequence of adjudications, the Oklahoma Courts, in all the orders/decisions cited, scrupulously avoided any reference at all to the Impairment of the Obligations of Contracts Clause of the Constitution. One Justice dissented without opinion from

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[1] Under Oklahoma practice, all civil appeals are taken (at least initially) to the Supreme Court of Oklahoma, see Oklahoma Supreme Court Rules 1.20 et seq. That Supreme Court may, in its discretion, delegate an appeal to a Division (there are four) of the [intermediate] Court(s) of Civil Appeals; see Oklahoma Supreme Court Rule 1.24. Discretionary review thereafter by the Oklahoma Supreme Court is available by a petition for certiorari to the said Supreme Court. Oklahoma Supreme Court Rules 1.170 et seq. The Rules of the Oklahoma Supreme Court can be found in Appendix 1 to Chapter 15, Title 12, of the Oklahoma Statutes.

the Oklahoma Supreme Court's denial of certiorari. All these judicial actions have been unreported.

## JURISDICTION

The actual opinion to be reviewed was entered by the [intermediate] Court of Civil Appeals, Division III, of the State of Oklahoma, on July 11, 2008 [Appendix 1]. A timely and proper Petition for Rehearing was denied by that Court on August 28, 2008 [Appendix 16]. A timely and proper Petition for a Writ of Certiorari was eventually denied by the Supreme Court of Oklahoma on February 2, 2009 [Appendix 31].

Jurisdiction to review the State decision(s) below is conferred upon the Supreme Court of the United States by 28 U.S.C. 1257 and 2104, and Supreme Court Rules 10(c) and 13(1 and 2).

## LEGAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> No State shall . . . pass . . . any Law impairing the Obligation of Contracts . . .

Article I, Section 10, Paragraph 1.

And certain provisions of the Oklahoma Guardianship Code provide:

> **§ 4-403. Compensation for Attorneys, Guardians ad Litem and Persons Conducting Evaluations.**
>
> A. 1. An attorney, other than a public defender, for a ward or a subject of a proceeding pursuant to this act or whose services are obtained by a guardian on behalf of a ward is entitled to reasonable compensation to be paid from and as a charge against the estate of the ward.
>
> * * *
>
> B. 1. Compensation and reimbursements pursuant to this section shall be paid from the financial resources of the subject of the proceeding unless the court determines such payments of compensation and reimbursements would:
>
> a. substantially impede the partially incapacitated or incapacitated person from meeting the essential requirements for his physical health or safety, and
>
> b. substantially impair the financial resources of such person, or substantially impede his ability to obtain the services necessary for developing or regaining his abilities to the maximum extent possible.

2. If not otherwise compensated or reimbursed pursuant to the provisions of paragraph 1 of this subsection:

a. any attorney or guardian ad litem appointed by the court who is entitled to compensation shall be compensated from the court fund of the court having jurisdiction;

* * *

3. Compensation or reimbursement from the court fund for attorney's and guardian ad litem pursuant to the provisions of this subsection shall be in accordance with the provisions of Section 1304 of Title 20 of the Oklahoma Statutes.

C. **All compensation and reimbursements pursuant to the provisions of this section shall be approved by the court prior to payment.**

* * *

30 O.S. 4-403 (emphasis added).

## STATEMENT OF THE CASE

This case involves the right to legal representation of a citizen, frequently one elderly and aged, facing involuntary guardianship prosecution. Three

times in his career (of some 40+ years), counsel has been involved in such contested guardianship cases, in each instance on the side of the accused oldster. In his own experience, counsel has noticed several disturbing patterns, one of which is that the chances of hostile commitment proceedings seem to increase in direct proportion to the oldster's age and wealth (Ms. Sweetin was 89 when counsel became involved in this litigation, and had a net estate somewhat upwards of about $600,000, without debts, and with income sufficient for her to live a respectable retirement life in her own fully-paid-for home). Also, at least in counsel's experience and observation, what triggers the intervention of the usual relatives (maybe close by blood, but rather distant in relationship) has been the oldster's formation of a friendship with a younger person of the opposite sex. [For the appellate (but unreported) decision in the second of counsel's such cases, of quite some years back, see *In the Matter of Glenn O. Young*, No. 64460, Okla.App., Div. 4, Nov. 1, 1988, cert. den., Feb. 3, 1989 (Okla., unpublished) [Appendix 63] (furnished in the Appendix as some circumstantial corroboration of counsel's observations).] And third, in every one of these cases, counsel's involvement has been preceded by a "quickie" (and *ex parte*, or virtually so) "freeze" on the oldster's assets, precluding the oldster from paying a legal retainer. However, in this particular (Sweetin) case, the young man, a single U.S. Army Reservist with the Special Forces (where counsel, also a former Special Forces Reservist, had known him some years earlier), had actually been a friend of Ms. Sweetin's

sister, who died, back in the early-to-mid 'Nineties, the same day that Sergeant "E" had returned from a tour in Haiti. The family agreed that Sergeant E could remain in that house until things should begin to settle down (and to keep the house from standing unoccupied); and during that period, Ms. Sweetin, who was living nearby, but alone and out in the country, invited Sergeant E to move in with her, as a full-time house companion and general caretaker, and overall "man in the house," apparently under little more of a contractual understanding than a "John, you take care of me, and I'll take care of you" type of arrangement. Pursuant thereto, Sergeant E resided in Ms. Sweetin's house for about the seven or eight years preceding Ms. Sweetin's subsequent legal difficulties.[2]

But, on or shortly before March 15, 2004, an event occurred which triggered the panic of Ms. Sweetin's family, and, fearing some diminution in their own expected inheritances from Ms. Sweetin, they called in the Oklahoma Department of Human Services ("D.H.S."), which swooped down and carted Ms. Sweetin off to an institution, which seizure was shortly thereafter confirmed at an all-too-typical *ex parte* "railroading" (in the absence of Ms. Sweetin, and even of Sergeant E); and which initial "railroading" took place in Rogers County District Court

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[2] Lest there be any question, there has never been so much as a suspicion voiced by anyone involved in this litigation about any physical impropriety between Ms. Sweetin and Sergeant E.

Case No. PSE-2004-5, *State of Oklahoma ex rel. Department of Human Services v. Marie Sweetin*. As will be discussed in the next section, "Reasons for Granting the Writ," Oklahoma's Supreme Court and Legislature have on occasion pronounced and enacted truly memorable declarations in favor of the rights of the elderly and the aged (to include their right to counsel, if hired to protect their liberty, deemed under Oklahoma law to be a "necessary"). But, sometimes those lofty pronouncements do not seem to filter down to the "trenches" of Sooner justice.

Anyway, a few days later, Sergeant E called counsel for help, whereupon counsel promptly filed a State habeas corpus petition for Ms. Sweetin (in Rogers County District Court Case No. CJ-2004-179, *Mary Marie Sweetin vs. Lenetta Foreman, Adult Protective Services Specialist, Department of Human Services*), although counsel was, until the formal hearing therein (which took place on March 30, 2004) forbidden by both that Judge, and the DHS, to visit or even to communicate with Ms. Sweetin (even to verify her own wishes about counsel and habeas corpus). However, a friend of Ms. Sweetin's, who had been allowed to visit with her at the institution, heard her say, "Get me a lawyer to get me out of here," and that friend's affidavit to that effect became the basis for the said habeas corpus action which counsel then filed, on March 26, 2004.

The habeas case was heard on Monday, March 30, 2004, and whereat that Judge dismissed that habeas petition as "moot" since, His Honor said, he

had already decided to release Ms. Sweetin to her home (and His Honor did order Ms. Sweetin released to return home that afternoon). However, during the actual courtroom pendency of that hearing, a lawyer came in to announce that his client, a Mrs. Sandra Clark (and a niece of Ms. Sweetin's) had just filed the guardianship case, Rogers County District Court Case No. PG-2004-22, *In the Matter of Mary Marie Sweetin, an alleged incapacitated person*, which became the guardianship case from which this instant Petition has arisen. The Judge in that case (then an "Associate District Judge"), evidently extended the earlier *ex parte* temporary guardianship which had been obtained (either *ex parte*, or mostly so) in the DHS's Rogers County District Court Case (No. PSE-2004-5), and later dismissed or consolidated both the DHS case (No. PSE-2004-5), and the habeas corpus case (CJ-2004-179), into the Guardianship Case (PG-2004-22). As part of his initial paperwork in the Guardianship Case, His Honor also signed and had served upon Ms. Sweetin the statutorily-required "Advice of Rights," which included the advisement that,

> **You have the right to hire an attorney of your choice to represent you.**

30 O.S. 3-110(D). Anyway, after Ms. Sweetin returned home, Sergeant E (and he was soon to be mobilized for Iraq) asked counsel to drop by the Sweetin residence, just outside of Tiawah (east of Claremore), to discuss the matter with Ms. Sweetin, especially with the view of representing her in the Guardianship

case. On or about April 13, 2004, counsel did visit Ms. Sweetin at her residence, primarily to discuss representation. During that conversation (conducted in Sergeant E's absence),[3] counsel naturally pointed out the advantages of her obtaining local (Claremore) counsel; and counsel explained his fee expectations, which for her would be counsel's "civil liberties" rate of $150.00 per hour, plus out-of-pocket expenses, and an initial retainer of $10,000; and counsel left a draft contract with her to "think it over." The better part of a month later, either Ms. Sweetin herself, or her attendant (an elderly niece, actually) telephoned counsel to advise that Ms. Sweetin had signed the contract, and for counsel to come by and pick it up. Of course, at that time, Ms. Sweetin was already under the *ex parte* continuation of a temporary guardianship, and could not actually pay counsel. But, with the Contract for Legal Services [Appendix 54][4] in

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[3] Because the DHS had summarily ejected Sergeant E from Ms. Sweetin's house (which was Sergeant E's legal residence too!), and which ejection received the Rogers County *ex parte* "stamp of approval" (*i.e.*, without notice to or appearance by either Sergeant E or Ms. Sweetin).

[4] Actually, there were four contracts, or at least contractual-like documents herein, Appendix 54, 56, 57, and 61. The contract at Appendix 61 was Ms. Sweetin's rehiring counsel; several months earlier, a misunderstanding had arisen wherein counsel *understood* that Ms. Sweetin did not desire counsel's services any longer, and, with leave of Court, counsel withdrew. In subsequent conversations with Ms. Sweetin, she declared that she *thought* that counsel did not desire to continue representing her any further (which was definitely not correct). After further discussions, Ms. Sweetin telephoned counsel, and instructed him

(Continued on following page)

hand, counsel attached same to his Entry of Appearance in the Guardianship case, and either then or shortly later moved the Court to disburse the $10,000 retainer to counsel, primarily for independent discovery, evaluation, and the like.

Then ensued a series of conferences in chambers with the Associate District Judge, who "stonewalled" any disbursement to counsel, and eventually declared that he was not "recognizing" counsel as the attorney for Ms. Sweetin (notwithstanding his issuance of the statutory Notice of Hearing to Ms. Sweetin, which had included the language quoted above from 30 O.S. 3-110(D) [that "**You have the right to hire an attorney of your choice to represent you**"], and eventually declared that His Honor wanted to interrogate Ms. Sweetin alone, in chambers, and in the absence of counsel, and for counsel to produce Ms. Sweetin thereat, which interrogation was scheduled for May 18, 2004.

Seeing the "handwriting on the wall," counsel prepared and filed for Ms. Sweetin, on May 17, 2004, an appellate action in the Oklahoma Supreme Court,

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to bring a new contract out to where she was staying (temporarily at a nursing home in Tulsa); after being shown the proposed new contract, and some further discussions about the appellate attorney's fees (in Appeal 100,697), which counsel explained had not as yet been paid, Ms. Sweetin, after some reflection, did agree to the contract, and signed same – in the presence of the Administrator of that facility. Counsel does not believe that this affects the issues presented herein.

Appeal No. 100,697, *In the Matter of the Guardianship of Mary Marie Sweetin*, as either an appeal and/or an original action against the threatened District Court actions from taking place in the absence (or "non-recognition") of Ms. Sweetin's own privately-retained counsel. However, counsel was not able to obtain from the Oklahoma Supreme Court a stay of the Rogers County proceedings already set for May 18, 2004 (the next morning, in fact); nor would the Guardianship Judge himself allow a stay that next morning.

What happened at that 'proceeding' before that Judge on May 18, 2004, was, simply, the interrogation of Ms. Sweetin in the absence of counsel, until His Honor exacted from her whatever it was that His Honor felt that he could take as sufficient doubt in her own mind as to whether Fred Gilbert was in fact her best choice. See Transcript, in Rogers County, PG-2004-22, of May 18, 2004 [not included in the Appendix hereto]. That Judge then terminated the secretive in-chambers and uncounselled examination of Ms. Sweetin, followed by the Court's discharge of counsel as her attorney, and immediately called over to the Court House and appointed a Mr. S (a former Rogers County judge) as counsel for Ms. Sweetin. Ms. Sweetin was offered no choice in the selection of her own successor counsel; that was to be Mr. S, pure and simple. Of course, when a court, for some reason, disqualifies a litigant's attorney, it is normally the litigant himself or herself who selects his or her own successor counsel. Indeed, for a tribunal to impose

counsel of its own choice upon a litigant was viewed by the U.S. Supreme Court, in *Faretta v. California,* 422 U.S. 806, at 821 (1975), as tantamount to a reversion to Star Chamber. In any event, the aura of judicial cronyism was unmistakable.

However, a few days later, on May 24, 2004, and on His Honor's own motion, the Judge entered his judicial "oops," which was formally styled "Order Reconsidering Order of May 18, 2004, and Previous Orders of the Court" – in which His Honor confessed not following the mandate of *Towne v. Hubbard,* 3 P.3d 154 [2000 OK 30] (Okla., 2000), wherein the Oklahoma Supreme Court had strongly disapproved of the mechanism previously resorted to in that case, of a guardianship judge's disqualification of some troublesome lawyer defending an alleged incompetent (or "incapacitated person"). However, that *Sweetin* Guardianship Judge then recused on June 15, 2004, and another Associate District Judge was assigned to this case.

After an initial status conference with the new Judge, on June 21, 2004, something of an "era of good feeling" crept into this litigation: the new Judge, after himself reading the Transcript of May 18, 2004, concluded that Ms. Sweetin had indeed expressed her desire for her own privately-selected attorney (Fred Gilbert), which choice the new Judge ratified, and also allowed Mr. S. to withdraw. His Honor also awarded counsel $5,000 in temporary fees, and indicated that the Court would entertain counsel's previously pending Application for Attorney's Fees,

once amended somewhat. [This was all memorialized in the "Orders Upon Status Conference," filed upon July 27, 2004]. Meanwhile, counsel's "Application for Order Directing Disbursement of Attorney's Fees," filed on July 19, 2004, was heard on September 20, 2004. Included in that Application was some $25,000 for District Court-level efforts and expenses (from which was to be deducted the $5,000 advance awarded on June 21, 2004), plus some $14,000+ for services related to Appeal No. 100,697. At the hearing of September 20, 2004 (and in one of the few proceedings that was not reported), His Honor awarded some $19,000 for counsel's trial level work (reflecting a credit for the $5,000 previously advanced), but nothing for the some $14,000+ for the interlocutory appeal (No. 100,697), on the stated basis that His Honor did not want to encroach upon the prerogatives of the State Supreme Court. So, on October 27, 2004, counsel filed with the Oklahoma Supreme Court an "Application for Attorney's Fees," to comply with the new Associate District Judge's disinclination to award appellate attorney's fees – and by then the tab had climbed to some $16,000, reflecting *inter alia* two Amended Petitions-in-Error, for reacting to continuing changes down in the Guardianship Case. And there the matter sat, for months. So, on April 14, 2005, counsel filed a "Suggestion of Possible Mootness" in the Oklahoma Supreme Court (but pointing out that that Appeal, No. 100,697, had been anything but moot when originally filed, and for quite some time thereafter), but requesting a voluntary dismissal, so the appellate attorney's fees issue could be

remanded back to the District Court, without the District Judge's concerns over 'encroaching' upon the State Supreme Court's prerogatives. And, eventually, the Supreme Court did enter a voluntary dismissal of Appeal 100,697, on May 23, 2005, with instructions for the District Court to consider the appellate attorney's fees issues. Thus, on or about May 31, 2005, counsel filed, back in the Guardianship case and pursuant to the Supreme Court's Order (of dismissal for mootness and remand to consider the appellate attorney's fees therein), a "Renewed Application for Appellate Attorney's Fees," which His Honor then set down for June 2, 2005, along with some other matters in the said Guardianship case.

However, when counsel walked in to the Judge's chambers on the said June 2, 2005, the Judge greeted counsel with the declaration that "I'm denying your application for appellate attorney's fees." Counsel immediately felt that the "era of good feeling" had come to an abrupt halt, and began to sense that the Judge was about to side more with Ms. Sweetin's family than with Ms. Sweetin. It will be recalled that back on September 20, 2004, His Honor had said that he was denying appellate attorney's fees out of a scruple for not encroaching upon the Supreme Court's prerogative; but then when counsel got the appellate attorney's fees issues remanded to the District Court, His Honor then voiced an abruptly different story.

And this may be as good a place as any to mention one detail that may have contributed to counsel's eventual descent into judicial disfavor: and that was

counsel's demand to be present whenever Ms. Sweetin should be involuntarily examined by a psychologist or the like. True, *Estelle v. Smith,* 451 U.S. 454 (1981), was criminal, while guardianship is civil; but the reasoning of *Estelle v. Smith* should at least equate to the *presence* of an oldster's lawyer at a court-mandated mental evaluation. But in Oklahoma, the person facing an involuntary medical or mental evaluation also enjoys the presence of a representative or supporter (who is usually a lawyer): 12 O.S. 3235 (Oklahoma's analogue to Federal Rule of Civil Procedure No. 35), in Subsection D thereto. And by case-law, that representative (usually the subject's lawyer) may take notes and make an audio recording. *McCullough v. Mathews,* 918 P.2d 25 [1995 OK 90]. (Okla., 1995); and that right has now been expanded to the lawyer's making a videotape of the examination, *Boswell v. Schultz,* 175 P.3d 390 [2007 OK 94] (Okla., 2007).

Of course, an involuntary mental examination under 12 O.S. 3235 may not be quite the same thing as under 30 O.S. 3-108 (evaluation in guardianship); but it is difficult to believe that Oklahoma's Supreme Court would draw a distinction to the prejudice of an examinee under Section 3-108, and deny the presence of the same counsel as freely allowed under Sec. 3235. But, neither Guardianship Judge took kindly to counsel's demand to at least be present during any mental evaluation of Ms. Sweetin.

* * *

The courtroom (*i.e.*, not the in-chambers) proceedings pertinent to the appellate attorney's fees are covered in the extract furnished [at Appendix 32, 34-37] from the Transcript for June 2, 2005, and which was later memorialized into the "Order" of June 10, 2005 [Appendix 26]. And there was a similar denial (in the "Order Setting Hearing") of attorney's fees (for non-appellate services) entered on September 15, 2005 [Appendix 24].[5] Counsel filed timely Motions for New Trial against both these denials, and supported them with delayed Memoranda (for which briefing His Honor did grant generous extensions). In the said Motions for New Trial, and/or in the supporting briefing, counsel raised the issues herein that he had enjoyed *contracts* of retention with Ms. Sweetin (as will be discussed at the beginning of the next section, "Reasons for Granting the Writ"), and that those contracts were covered by the Impairment of the Obligation of Contracts Clauses of the U.S. Constitution. [Extracts from counsel's pleadings in question are reproduced at Appendix 53-58, documenting that at least from those points on, counsel was raising the constitutional issues herein]. But on February 13, 2006, the trial Judge overruled counsel's still-pending Motions for New Trial, in the "Order Allowing

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[5] That Application was for different services, and has a somewhat different procedural history than the Application for Appellate Attorney's Fees. However, the Impairment issue remains the same.

Attorney's Fees" [*sic*][6] of that date [Appendix 17, 19-21], thereby exhausting counsel's opportunities for getting paid at the District Court level. Counsel then initiated his appellate action therefrom by filing a Petition in Error with the Oklahoma Supreme Court (in Appeal No. 103,156), an extract from which Petition in Error is reproduced at Appendix 47-48 hereto, showing that the primary grounds for the said Appeal were still an alleged incompetent's right (under Oklahoma law) to *contract* with an attorney for legal representation in support of the citizen's liberty – viewed in Oklahoma as a "necessary" – and upon that, the recognition that even the incompetent's (and her attorney's) *contractual* relationship with each other would fall under the protection of the constitutional prohibitions against a State's Impairment of the Obligation of Contracts Clause to the Constitution, and hence beyond the "veto power" of the Guardianship Judge to "disapprove." In due time, counsel's appellate brief was filed, an extract of which is reproduced at Appendix 44 hereto, showing the Table of Contents thereof [Appendix 45-46], and revealing at least these same issues were being urged upon the said Appeal (No. 103,156); and when the Court of Appeals affirmed, with absolutely no mention

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[6] The misnomer here reflects the fact that in the said Order, the Guardianship Judge awarded some $60,000 of Ms. Sweetin's money to the other lawyers in the case, on the stated basis that those lawyers had represented "prevailing parties" (a gross distortion of the historical facts), under 30 O.S. 4-761, which was totally inapplicable to any aspect of the *Sweetin* litigation.

whatsoever of the constitutional issues herein (as per Appendix 1-15, being the Opinion of the Oklahoma intermediate Court of Civil Appeals, Division III, entered on July 11, 2008). An extract of counsel's Petition for Rehearing (in the intermediate appellate court) is reproduced at Appendix 42-43 hereto, again showing counsel persistently urging the constitutional issues now raised before this Honorable Court; but the said Petition for Rehearing was denied, on August 28, 2008 [Appendix 16] hereto. Counsel then petitioned for a Writ of Certiorari from the Oklahoma Supreme Court (partially reproduced at Appendix 39-42 hereto), again showing the continued advancement of the same constitutional issues as raised now; but the Oklahoma Supreme Court denied *certiorari* on February 2, 2009 [Appendix 31 hereto].

Yes, it is discouraging that not one of the Oklahoma Courts involved with these issues has even mentioned them, let alone refuted them, or shown some legal reason for their inapplicability; but counsel has at least now exhausted his State remedies.

## REASONS FOR GRANTING THE WRIT

Before addressing the discretionary reasons for granting certiorari herein, let us first take a brief tour of a point of law that counsel had originally thought to present to this Honorable Court as a "Question Presented." However, counsel views this legal point to be sufficiently well-established (although

perhaps not particularly widely recognized) under Oklahoma's own law, such that this legal point need not, for now, necessarily be "Federalized."

That legal point is that, under Oklahoma law, an "incapacitated person" (formerly, an "incompetent"), whether facing a guardianship prosecution, or even if already so adjudicated, still retains and possesses what might be called "residual" competency or capacity (although that term is not publicly used) in *contracting* to retain and hire private counsel to defend against a charge of incapacitation (or incompetency) [and/or, alternatively, to seek a restoration to competency], as part and parcel of defending, preserving, or reacquiring his or her *liberty* – under Sooner statutes going all the way back to Statehood, allowing even the incompetent to purchase "necessaries." See, *e.g.*, 15 O.S. §§ 16-27, esp. §§ 20 and 22.

The first hints at the future "residual" competency of an incompetent to resist or challenge an adjudication of incompetency appears to have been *Appeal of Barnett*, 122 Okla. 160, 252 Pac. 410 (1927), where the Oklahoma Supreme Court ruled:

> Said statutes only relate, as the language clearly shows, **to the capacity of a person whose incompetency has been judicially determined to make a contract or conveyance or delegate any power or waive any right**. *There may be some question as to the validity of any contract of employment made between Jackson Barnett and his attorneys, since Barnett was adjudged an incompetent,*

> *but we are not concerned with that in this proceeding, but only with the right of his attorneys to institute and prosecute this action in the name of Barnett.* Inasmuch as the question here is the right of Jackson Barnett to attack the guardianship proceedings wherein he was held to be an incompetent, and not his right to execute a contract binding upon his estate, the cases cited by defendant in error are not in point.

*Id.*, 122 Okla. at 162, 252 Pac. at 411 (bolding in original; italics added). Then we had the Federal decision in *Bradburn v. McIntosh,* 159 F.2d 925 (10th Cir., 1947):

> The right of a person who has been adjudged an incompetent to institute and prosecute a proceeding for restoration to capacity must embrace the right to employ and be represented by counsel . . .

*Id.*, 159 F.2d at 932. Neither of these two cases, however, while raising the question of whether the adjudicated incompetent may *contract* to hire attorneys to prosecute a restoration proceeding, actually answers that question; but both seem to hold that if the incompetent has somehow managed to prevail upon one or more attorneys to represent him, then the courts should allow those attorneys to do so, and in their client's own name.

Then we come to *Estate of Bradshaw,* 607 P.2d 578 (Okla., 1980), which discussed the whole question in much greater depth:

There exists statutory authority for the institution of judicial restoration to capacity which has remained substantially unchanged since 1910. 58 O.S. 1971, § 854 states: "any person who has been declared insane or the guardian . . . may apply by petition to the county court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined . . . "

* * *

Subsequently, the 10th Circuit Court of Appeals held in *Bradburn v. McIntosh*, 159 F.2d 925 (1947), that the statutory right of a person to institute and prosecute a proceeding for restoration must embrace the right to employ counsel. The last-mentioned case stated that the contract for legal services made during the incompetency of the contracting party was unenforceable by reason of 15 O.S. 1971, § 24, which leads to a discussion of 15 O.S. 1971, § 22, which states:

> "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary to his support or the support of his family."

In the related matter of a contract for services rendered a minor, this Court has discussed the parameter of the term "necessaries" under the predecessor of 15 O.S. 1971, § 20. It was noted in *Grissom v. Beidleman*, 35

Okl. 353, 129 P. 853, at pp. 855 and 858 (1913):

> "We can conceive of conditions such that a minor may be bound to pay a reasonable compensation for the services of an attorney, on the ground that they were necessary, but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection or liberty . . . [W]here the services pertain to the defense of the liberty or person of the minor, or the prosecution of actions for an injury thereto, that the same should be classed as a 'necessary' and an action lie against the minor for a reasonable recovery for the attorney's fees; but where the legal services are rendered in behalf of the minor in relations to his property, without the intervention of a legal guardian, no recovery for such services should be had . . . "

* * *

Therefore, we apply the quoted portions of *Grissom*, supra, to the interpretation of 15 O.S. 1971 Sec. 24 and hold that where, as here, the legal services pertain to the defense of the liberty or the person of the incompetent, the same should be classed as a necessary and an action lie for a recovery of a reasonable attorney's fee for we know of no more necessary and urgent need of the person of an adjudicated incompetent than the ability to obtain the restoration to competency

> at the first instance he is entitled to, and as noted in *Barnett*, supra, the right to obtain counsel to that end is inextricably a part of the ability of the ward to achieve it.
>
> * * *
>
> The application for an attorney's fee filed herein speaks to a *contractual* arrangement between the appellant and the ward. The brief represented to the trial court on the matter flatly states that the theory under which appellant seeks an attorney fee is that such services were necessities . . .
>
> * * *
>
> That portion of the work done by appellant in defense of the person and liberty of the ward as a necessary is payable from the estate of the ward.

*In the Matter of the Estate of Bradshaw,* 606 P.2d 578, 580-582 (Okla., 1980). And in Footnote 2 to *Bradshaw,* our Supreme Court refreshingly stated:

> Note, however, the term "necessaries" is held not to be capable of rigid, inflexible definition, and depends at times upon the circumstances as evolved from the facts of each case.

*Id.*, 606 P.2d at 582. Thus, *Estate of Bradshaw* came very close to recognizing (but perhaps not *eo nomine*) the "residual" competency of an adjudicated incompetent (and, by *a fortiori* extension, of an accused, but not adjudicated incompetent) to hire, by contract, a private attorney, from the incompetent's own funds,

to defend (or rescue) the person from a charge or even an adjudication for incompetence, since one's legal liberty is the highest "necessary." Still, there is some lingering doubt whether *Bradshaw's* holding really went quite that far – for *Bradshaw* still speaks in terms of a "reasonable" attorney's fee, and of "obtaining" counsel.

So, let us now switch to 1988, when the Oklahoma Legislature enacted the present Oklahoma Guardianship Code, Title 30 to the Oklahoma Statutes.

A few quotations therefrom demonstrate that one thing the Legislature enacted was precisely such a "residual" capacity to *contract* for legal services for "necessities" (e.g., the defense of one's liberty):

> **§ 3-107. Appointment of Counsel – Explanation and Inquiry by Court – Replacement of Appointed Counsel – Determination of Independence of Retained Counsel – Record.**
>
> 2. The attorney appointed by the court shall be replaced by another attorney if:
>
> a. the subject of the proceeding prefers the services of an attorney other than the one initially appointed for him;
>
> b. the preferred attorney agrees to accept the responsibility, and

> c. the subject of the proceeding or the attorney whom he prefers notifies the court of the preference and the attorney's **acceptance of *employment***.

30 O.S. 3-107(E)(2) (emphasis added). This at least implies the subject's capacity to *contract* for the attorney's services, for how can a lawyer "accept *employment*" without a contract? And another section within the Guardianship Code is even more blunt:

> **§ 3-110. Notice of Hearing.**
>
> D. The notice to the subject of the proceeding shall set forth the date, time, place, and purpose of the hearing to which the notice refers. Such notice shall be substantially in the following form:
>
> NOTICE OF HEARING
>
> * * *
>
> **You have the right to *hire* an attorney of *your* choice to represent you . . .**

30 O.S. 3-107(D) (emphasis added). Again, how can any guardianship respondent *hire* an attorney "of your choice" without somehow *contracting* for that attorney's retention and services?

And finally, lest there be any lingering doubt on this subject, we need but to read the following:

> **§ 3-219. Limitation on Right of Ward to Contract.**
>
> Upon the appointment of a conservator, the ward shall not thereafter have the power to enter into any ***contract*** creating an obligation against his estate ***except for necessities***.

30 O.S. 3-219 (emphasis added). So, there we have it – a ward may *contract* (in a manner obligating the ward's estate) "for *necessities*." Stated otherwise, and now at least by statute (long hinted at in the case-law), a ward or prospective ward, and an attorney willing to assume the defense of such a person's liberty, may *contract* with each other, for the attorney to represent the oldster, and at a compensation agreed upon between the oldster and the attorney themselves. Thus, by the Legislature's own clarification as enacted in 30 O.S. 3-219, supra, the ward is no longer restricted to merely requesting, entreating, begging, or "conning" some lawyer to "please, *please*, defend me" – now, the alleged incapacitated person may simply *contract* with an attorney for his defense – at a price to be mutually agreed upon.

And let us not overlook the Oklahoma Supreme Court's own subsequent re-confirmation of the oldster's right to select, and hire, his own attorney, of his own choosing: and those are the decisions in recent years of the two *Towne v. Hubbard* decisions, 977 P.2d 1084 (Okla., 1999) [1999 OK 10] ("*Towne I*"), and 3 P.3d 154 (Okla., 2000) [2000 OK 30] ("*Towne II*"), the first of which establishes or reaffirms that the

disqualification of a guardianship oldster's privately-selected attorney is directly and immediately appealable as of right,[7] and the second of which cases establishes that a privately-selected attorney may only be disqualified by process consistent with the most scrupulous compliance with procedural Due Process of Law, both State and Federal. [Indeed, it appears that it was the belated reading of the second *Towne v. Hubbard* decision that caused the first Judge to emit His Honor's judicial "oops"[8] back in May of 2004.] Given both the Oklahoma Legislature's 1988 enactment of our present Guardianship Code, plus our Supreme Court's promulgation of *Towne v. Hubbard, I* and *II*, there appears to be scant basis left for denying but that the oldster does indeed retain, however verbalized, a "residual" competency to *contract* with a private lawyer for legal services to defend against a guardianship rap.

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[7] The decision in *Piette v. Bradley & Leseberg*, 930 P.2d 183 [1990 OK 134] (Okla., 1990), held and established that the disqualification of a litigant's attorney constitutes a "final" order, and hence appealable as of right, and right then. In this regard, Oklahoma is more generous than even the U.S. Supreme Court, which does not view an attorney's disqualification *pendente lite* as directly appealable as of right; *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). *Towne I* held the disqualification of a respondent's guardianship counsel as a directly and immediately appealable order; and *Towne II* promulgated some very stringent Due Process requirements that must be satisfied before disqualifying a guardianship respondent's privately-selected counsel.

[8] *I.e.*, His Honor's "Order Reconsidering Court's Order of May 18, 2004, and Previous Orders of the Court," filed on May 24, 2004 [ROA #43].

But, say the District Court of Rogers County, and the Oklahoma Court of Civil Appeals, such residual right to *contract* for an oldster's defense avails the incompetent nothing, because the Guardianship Judge, with his powers under 30 O.S. 4-403(C), can simply "disapprove" attorney's fees that he, the Judge, personally does not concur with, and thereby neutralize the incompetent's power to have contracted in the first place. Counsel strongly disbelieves that that was the Legislature's intent, but the State Courts say that it was.

However, resolving this dilemma is the legal authority which the State Courts have persistently overlooked in this whole matter: the existence of the Impairment of the Obligation of Contracts Clause of the Constitution, that in quite simple and unambiguous language, declares that "No State shall . . . pass . . . any Law impairing the Obligation of Contracts . . ." Article I, Section 10, Paragraph 1.

So here is what the Constitution seems to mean: once the Legislature confers upon an incapacitated person the "residual" capacity or competency to *contract* for necessities, such as retaining counsel for the defense of his or her liberty, then the Impairment Clause stops the Guardianship Judge, whether acting on the basis of Section 4-403(C) or otherwise, from nullifying that attorney-client contract by simply "disapproving" payments to the attorney in fulfillment of the respondent's contractual obligations. Thus, the prohibition from the Impairment Clause resolves the apparent conflict in the legislation

included within Title 30 of the Oklahoma Statutes (and which conflict counsel believes to be more apparent than real, but for the decision below).

Legally, this case presents a relatively uncomplicated question: does the Guardianship Judge's purported power to nullify a contract by simply "disapproving" a contractual payment to an attorney, constitute an "impairment" of that contract, and, hence, a conflict with the Impairment Clause? So far, the State Courts have simply avoided coming to terms with that question, and so long as they continue to avoid the issue, we obviously will not be getting any reasoned, reliable judicial answer from the State Judiciary to explain how "disapproval" does not equate to "impairment" of the contract.

The substantive issue is not obscure. But, under the rubric of "Reasons for Granting the Writ," let us start with maybe a hundred million such reasons or so, namely, the mushrooming percentage of the elderly and the aged in contemporary American society; and anything which impacts upon this segment of our population should command the attention of our Courts, even our highest ones.

Sadly, the rise in the sheer numbers of the elderly and the aged may threaten to spawn a "boom" in guardianship litigation, and, in some perverse way, give rise to an increase in the number of attempts at judicial "railroading" of the same elderly and the aged, especially if they have significant assets. Indeed, any elderly or aged person in today's America is

a potential target for a predatory guardianship prosecution. Of particular concern should be the fact that increasing numbers of potential heirs might come to feel tempted to use guardianship as a pre-emptive asset-conserving mechanism, nominally for the oldsters, but also, just maybe, to preserve those assets ultimately for the oldsters' own heirs. The quality of justice that the elderly and the aged receive from our legal system impacts on all American life.

Under what the Oklahoma Courts are saying about the administration of guardianship law in the State Courts, even that remaining sliver of full citizenship and adulthood – personhood, actually – namely, the right to contract with independent counsel for the defense of the person's own liberty (long viewed as a "necessary"), is at risk, for the guardianship judge does not need to feel bound, even in the least, to honor whatever commitments an oldster may have extended to a lawyer in exchange for the latter's professional services. Here, the concern of most lawyers otherwise inclined to help the oldster will now have to give grave pause as to whether the oldster can actually "deliver." Fear can be corrosive, and if the oldster cannot offer a lawyer an *enforceable* contract, then the chances of a predatory guardianship for millions of our people loom even larger – "just like taking candy from a baby."

Especially concerned could well be our best lawyers – the vigorous ones for whom the tradition of the zealous and independent advocate of those needing counsel has long had the greatest appeal. Yet,

these lawyers may be the most to be discouraged from taking on the representation of the elderly and the aged, because of the common realization that a guardian judge's virtually absolute "veto power" (and virtually absolute "impairment" power) can readily be used (or abused) as a selectively potent weapon for 'rewarding' the 'good' advocate, who doesn't "rock the boat" in guardianship court, and punishing that 'overzealous' advocate who does. Indeed, with the guardianship judge's virtual absolute 'discretion' in allowing payments from the estate of an elderly or aged American, the guardianship judge can make it seem that he, the judge, is the one doing the advocate some kind of a 'favor' in just allowing an advocate to be paid from the lawyer's own client's assets. And this can lead to the grave conflict in interest that Section 4-403(C) poses: vigorous advocacy is not always appreciated, especially in courts where the adversary system is usually not the norm. In such situations, some guardianship judges might be tempted to handle 'vigorous' lawyers (hired by the respondents themselves) by withholding the funding of those deemed to be a bit too 'vigorous,' and it is difficult to conceive of a sharper conflict of interest than by allowing a guardianship judge the raw power to keep private counsel from being paid for representing a client who can afford a legal defense. At some point, such a guardianship judge can virtually run off any lawyer deemed to merit his displeasure.[9]

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[9] And this could explain what the second Guardianship Judge in *Sweetin* was driving at when, after denying counsel's

(Continued on following page)

From the lawyers' standpoint, the essential worthlessness of a solemn, written contract with a client needing representation is a great dissuader from getting involved in guardianship representation in the first place. Thus, the real losers are not the lawyers, but those who would be their clients, and who may desperately need the lawyers' services. If the oldsters cannot obtain vigorous and independent counsel – even with their own money!! – then many oldsters might simply have little practical choice left but to try to "plea bargain" some "deal" less onerous than that of total, unconditional surrender (such as being confined in a so-called "nursing" home, where they all too often may only rarely be visited by their "loving" relatives).

Certainly representing the elderly and the aged in guardianship is almost always an uphill battle, and frequently burdened by at least one emergency appeal along the way. In a way, representing an oldster under such circumstances is much like representing a wife in a divorce case: the husband's lawyer can usually count on a fairly reliable "pay as you go" mode of payment, but the wife's attorney is all

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appellate attorney's fees *in toto*, His Honor stated:

> JUDGE McBRIDE: The Court is denying those [appellate] fees for the reasons stated. If you wish to use that as grounds to withdraw as Ms. Sweetin's attorney, I would, you know, entertain that.

Transcript of June 2, 2005, Appendix 32, at 36.

too frequently relegated to what might euphemistically be called a "contingency" mode of payment.

Thus, the conflict between Sec. 4-403(C) and the Impairment Clause clearly calls for the Supreme Court's review – especially in view of the State Court's virtual "default" on this subject.

Legally, it *appears* as though this case should not be particularly difficult on its substantive merits. The Impairment Clause is rather simple, and not cluttered up with "magnificent vagueness" or "penumbras" emanating from some of the more subjective clauses of the Constitution; and, although there has not been particularly much Impairment Clause litigation at the Supreme Court level in recent years, still, the Court's last major pronouncement thereon, *United States Trust Company of New York v. New Jersey,* 431 U.S. 1 (1977), establishes that the Impairment Clause is still a part of the Constitution. And, while on the subject that *United States Trust* was decided well over thirty years ago, counsel would submit *that* as an additional reason for granting the Writ herein: to enable the present generation of Justices to express their own opinions; and in this case, there certainly is at least an *appearance* that 30 O.S. 4-403(C), whatever else its worth might be, is *precisely* a State enactment (as construed by the highest Oklahoma Court wherein a decision could be had, but which simply avoided the issue) *authorizing* the impairment of the obligation of contracts – contracts which, in all too many cases, are of vital importance to the elderly and the aged who might

desperately want to be able to enter into what a lawyer might recognize as an enforceable contract.

The only problem here might lie in the "boat-rocking" impact upon the guardianship community, which arguably could be on some par with the initial impact of *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Miranda v. Arizona,* 384 U.S. 436 (1966). To this, counsel can only urge that the furor over *Gideon* and *Miranda* did eventually die down; and that any "boat-rocking" down in the "trenches" would be long overdue.

## CONCLUSION

The Oklahoma Courts, as evidenced by the highest Oklahoma Court in which a decision could be had, show evidently no interest whatsoever in reviewing how the elderly and the aged can possibly exercise their right to contract with an attorney for their defense, if a guardianship judge can impair that contract to meaninglessness through the simple expedient of "disapproving" the contractual consideration owing to defense lawyers.

Counsel urges the Honorable, the Supreme Court of the United States, based upon the State Court's default of their responsibilities herein, to exercise its responsibility, and to grant the Writ herein.

Respectfully submitted,

FRED P. GILBERT
830 Beacon Building
406 S. Boulder
Tulsa, Oklahoma 74103-3825
(918) 583-4276

*Petitioner, and Attorney*
*for Mary Marie Sweetin*

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION III

| | | |
|---|---|---|
| IN THE MATTER OF THE GUARDIANSHIP OF MARY MARIE SWEETIN, an alleged incapacitated person. | ) | |
| FRED P. GILBERT, | ) | |
| Appellant, | ) | Case No. 103,156 |
| vs. | ) | |
| ROBERT S. POST, Special Administrator of the Estate of Mary Marie Sweetin, deceased, | ) | |
| Appellee. | ) | |

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE TERRY H. McBRIDE, TRIAL
JUDGE

AFFIRMED
(Filed Jul. 11, 2008)

Fred P. Gilbert,
Tulsa, Oklahoma, Appellant *Pro Se*,

Robert S. Post,
Claremore, Oklahoma Appellee *Pro Se*.

## OPINION

ADAMS, Judge:

¶1 Fred Gilbert appeals trial court orders in this guardianship case which denied him payment from the guardianship estate for a portion of the attorney fees to which he claims entitlement under a contract with the now-deceased ward, Mary Marie Sweetin,[1] and for other services rendered in connection with a prior appeal in Case No. 100,697. No abuse of discretion, erroneous conclusion of law or other legally cognizable circumstance is demonstrated on the record, and the order denying Gilbert's claims for attorney fees is affirmed.

¶2 Gilbert's claims for attorney fees all relate to proceedings which ultimately lead to the appointment of a guardian for Ms. Sweetin. Those proceedings commenced with the filing of a petition seeking appointment of a temporary guardian and involuntary adult protective services on March 15, 2004. The Oklahoma Department of Human Services was appointed as her temporary guardian and to provide her with other services on March 19, 2004. Gilbert received notice of that petition and of a March 29, 2004 petition filed by Sandra K. Clark asking that she be appointed guardian of Ms. Sweetin. He

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[1] Ms. Sweetin, then 92 years old, died on December 18, 2005. All the trial court proceedings at issue here occurred prior to that time.

entered his appearance for Ms. Sweetin on April 7, 2004. Numerous proceedings were held subsequently.[2]

¶3 Gilbert appeals from the denial of attorney fees for two separate periods: (1) $34,239.36 for services and expenses at the district court from June 17, 2005, through August 31, 2005, and (2) for a prior appeal, Case No. 100,697, in the amount of $19,944.57. These fees were initially claimed in a Renewed Application for Appellate Attorney's Fees and Costs, filed in the trial court on May 31, 2005, and a Third Supplemental Application for Attorney's Fees, filed on September 9, 2005, in the trial court. Both requests were denied.

*Attorney Fees for Appeal No. 100,697*

¶4 Gilbert argues that an appeal was necessary because the trial judge refused to recognize the validity of his retention by Ms. Sweetin. After a trial

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[2] Issues addressed at various hearings included: (1) Ms. Sweetin's capacity to make decisions and to contract; (2) requests for protective orders, injunctive relief, and a writ of habeas corpus; (3) the appointment and removal of attorneys, a conservator, and limited and temporary special guardians, as well as the payments appropriate for their services; (4) court approvals for property transactions and the disbursement of Ms. Sweetin's funds; and (5) termination of the adult protective proceedings. The various issues raised were all contested or promoted by those involved, which included, at various times not only limited guardians, a temporary limited guardian, a conservator, and attorneys but also relatives of Ms. Sweetin, her friends, and the Oklahoma Department of Human Services.

judge questioned Ms. Sweetin's capacity to contract for private counsel at a hearing on April 13, 2004, and refused to recognize Gilbert as her counsel or to allow him direct access to records from the protective services proceedings,[3] Gilbert filed the petition in error on May 17, 2004, initiating appellate Case No. 100,697. In that appeal he raised allegations of error and raised arguments about Ms. Sweetin's right to privately retained counsel of her own choosing. He also requested a writ of mandamus and/or prohibition to compel the trial judge to recognize an employment contract with Ms. Sweetin and to compel payment of his retainer.

¶5 According to an Order Detailing Status Conference of May 18, 2004, Gilbert objected that day to the trial judge's inquiries at that time of Ms. Sweetin in the presence of her guardian but without the presence of counsel. After making those inquiries, the trial judge concluded that Ms. Sweetin was confused about her retention of counsel and informed Gilbert that he would not recognize Gilbert as her attorney and that Gilbert should not contact her. Another attorney was appointed as Ms. Sweetin's counsel, and the trial judge ordered that arrangements be made for an evaluation of Ms. Sweetin's capacities. The transcript of that status conference also indicates that the trial judge was concerned

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[3] The trial judge ordered that Gilbert could have contents of the file "verbally made known" to him but he could not access the files otherwise.

about potential conflicts caused by Gilbert's association with the person named to serve as Ms. Sweetin's guardian in a durable power of attorney, *i.e.*, conflicts potentially affecting independence.

¶6 Subsequently, in an Order Reconsidering Court's Order of May 18, 2004, and Previous Orders of the Court, the trial judge stated he had reviewed *Towne v. Hubbard,* 2000 OK 30, 3 P.3d 154, and concluded that case was "extremely similar." The trial judge determined that his finding that Ms. Sweetin "could not knowingly retain counsel or make a decision about the need for counsel" should be "held in abeyance pending a hearing held in conformance with *Towne*." Pending that hearing, the temporary guardian was to consult Ms. Sweetin to determine if she wished to consult with Gilbert and to facilitate that consultation if she so desired.

¶7 Gilbert filed an Application for Stay or Continuance Pending Disposition of Appeal No. 100,697 on May 27, 2004, arguing that although "[t]he bulk of this Application was drafted before counsel received the three Orders filed in the District Court on May 24, 2004," he still objected to language in the reconsideration order stating that the trial judge still did not recognize him as Ms. Sweetin's attorney, there was ambiguity in use of the term "abeyance," and he was doubtful about how the "so-called Towne hearing" would be conducted. He requested that all proceedings be stayed or continued "pending the Supreme Court's pleasure in Appeal No. 100,697."

¶8 On June 3, 2004, Gilbert filed an amended petition in error in No. 100,697, adding allegations of error in the interrogation of Ms. Sweetin by the trial judge and repeating prior allegations relating to the retention of private counsel and a durable power of attorney executed by Ms. Sweetin. Gilbert filed a Renewal of Motion to Disqualify on June 15, 2004.[4] The trial judge recused himself in a Request to Reassign case filed on June 15, 2004, citing his prior representation of Ms. Sweetin and her brother in a condemnation case as raising questions about an appearance of impropriety and impartiality. At the same time the trial judge filed a separate order which, among other things, stayed proceedings in the guardianship pending the assignment of a new trial judge, including the order for an additional competency examination of Ms. Sweetin. A new trial judge was assigned the next day.

¶9 On June 8, 2004, the trial judge had issued an order instructing the temporary guardian to facilitate meetings between Ms. Sweetin and Gilbert and

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[4] At the May 18, 2004 status conference, after a vigorous colloquy between Gilbert and the trial judge, Gilbert asked that the trial judge "disqualify for your obvious bias and tone against me," a request then refused. His renewed motion made allegations about the motivations of Ms. Sweetin' s family and argued that the trial judge's prior involvement in litigation with Ms. Sweetin, conduct of the May 18, 2004 Status Conference, use of "secret" information from the adult protection proceedings, and alleged biases he posited arose from improper *ex parte* communications raised an appearance of impropriety.

affirmatively ordering that Gilbert have access to all transcripts. The order also continues to the end of June 2004, the authority of the attorney appointed as temporary special guardian, and denies the May 27, 2004 request for a stay or continuance of the trial court proceedings, finding that the issues set for the *Towne* hearing "should be resolved in as timely a fashion as possible and that resolution of the same is in the best interest of the Ward," that is, Ms. Sweetin.

¶10 According to the Orders Upon Status Conference for a hearing on June 21, 2004, "Mr. Gilbert's status as Ms. Sweetin's counsel of record" was "recognized by the Court" and Gilbert was ordered to have a "right of access to the entirety of the Court (and related) File(s)." The trial judge found that good cause existed for reappointment of the temporary special guardian and ordered the guardian to disburse "a partial advance of $5,000" to Gilbert for briefing which "was mostly about [Ms. Sweetin's] right to have Mr. Gilbert as her attorney" and which "the Court has found to be meritorious." The trial judge found that a new evaluation of Ms. Sweetin was necessary in the guardianship proceedings because Gilbert had been denied access to and the opportunity to challenge records from the "vulnerable adult" case which had been adopted or judicially recognized in the guardianship proceedings.

¶11 Gilbert filed a Second Amended Petition in Error in No. 100,697 on August 2, 2004, which reframed the issues raised on appeal by omitting those previously stated regarding the retention of private

counsel, retaining the allegation of error concerning treatment of a durable power of attorney, and stating several new allegations of error relating to the institution of the guardianship proceedings, the legality of reappointment of a temporary guardian, and the "involuntary mental evaluation" ordered to be held without the presence of counsel during the examination.

¶12 On October 22, 2004, the trial judge entered "Order Appointing Limited Guardian and Conservator ('Consent Decree')," (hereafter, October 22, 2004 Consent Decree) which (1) finds Ms. Sweetin is a partially incapacitated person who retains some rights and capacities; (2) sets limits on her ability to form certain types of contracts or to make gifts over a certain amount; (3) provides for certain payments and reimbursements; (4) notes the Durable Power of Attorney and Nomination of Guardian and Conservator signed by Ms. Sweetin but finds that the person there nominated is not appointed because he is unavailable due to active military service; (5) discharges the temporary special guardian; (6) appoints a conservator for her property; and (7) appoints a separate limited guardian for Ms. Sweetin's personal needs and to make, subject to some enumerated reservations, decisions about Ms. Sweetin's medical care. The October 22, 2004 Consent Decree effectively mooted any potentially remaining issues regarding the appointment of a guardian or the durable power of attorney.

¶13 On May 23, 2005, upon agreement by the parties, the appeal in No. 100,697 finally was dismissed, and the Oklahoma Supreme Court entered a May 23, 2005 Order authorizing the trial court to consider a request "for payment of his attorney's fee for services rendered in connection with this appeal" and instructed it to "consider whether the fees requested are reasonable and the services rendered were necessary in defense of the person and liberty of the ward" and cited *Matter of Bradshaw's Estate*, 1980 OK 17, ¶12, 606 P.2d 578. Mandate later issued in No. 100,697.

¶14 Gilbert "renewed" applications for appellate attorney fees on May 31, 2005, and June 10, 2005, in the trial court. Those applications were denied. He filed a Motion for New Trial on Denial of Appellate Attorney Fees on June 24, 2005. On August 18, 2005, the parties entered into another consent decree (August 18, 2005 Consent Decree) and settled some remaining controversies in the guardianship but excepted from its provisions Gilbert's request for appellate attorney fees in No. 100,697.

¶15 At a hearing on October 24, 2005, the trial court found Gilbert's services in prosecuting Appeal No. 100,697 were "unnecessary." Applying *Bradshaw* and *Towne*, we agree. In *Bradshaw*, the Oklahoma Supreme Court found that actions pertaining to defense of a ward's liberty were a "necessary" for which even an incompetent ward could contract, while in *Towne* a hearing was constitutionally required for due process because a trial court's inquiry into the independence

of a prospective ward's retained counsel without affording the attorney an opportunity for the presentation of witnesses and evidence had deprived the ward of her due process right to a meaningful opportunity to protect her fundamental right to choose her own attorney. The opportunity to develop fully the facts "must minimally include the opportunity for a full adversarial evidentiary hearing and, if removal of the retained attorney is deemed warranted by the evidence, an order containing a specific factual finding of the disqualifying conflict of interest." *Towne*, 2000 OK 30, ¶19, 3 P.3d 162.

¶16 Gilbert filed "Petitioner's Request for Independent Inquiry Pursuant to 30 O.S. § 3-107.G"[5] on April 13, 2004, which was pending when the constitutionally infirm inquiry occurred on May 18, 2004. The trial judge noted that request and reconsidered his prior actions and findings on May 24, 2004, at which time he determined that the hearing requested should be scheduled and that the prior

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[5] Section 3-107(G) of Title 30 provides that

> [i]n all cases where independent counsel is retained by or on behalf of the subject of the proceeding, the court shall make independent inquiry to determine whether counsel is independent and whether any conflict of interest exists which would preclude proper representation of the subject of the proceeding or which would be detrimental to the best interest of the subject of the proceeding. The court shall appoint other counsel where retained counsel is found not to be independent.

determination regarding Ms. Sweetin's retention of counsel would be "held in abeyance pending a hearing held in conformance with *Towne*."

¶17 Consequently, any error in No. 100,697 premised on the effect upon Ms. Sweetin's liberty consequent to attorney retention issues were essentially moot within a week of the filing of the appeal.[6] By May 24, 2004, the hearing required by *Towne* to determine the independence of counsel was set for mid-June, rendering error premised upon a failure to conduct such a hearing moot and the allegations in that regard in the June 3, 2004 amendment of the petition in error unnecessary.

¶18 A trial court abuses its discretion when it bases its ruling on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. *Fent v. Oklahoma Natural Gas Co.*, 2001 OK 35, 27 P.3d 477. Based upon the record presented, we

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[6] A Journal Entry filed May 18, 2004, notes that a status conference was conducted on May 4, 2004, at which time the trial court ordered the special guardian "to pay the filing fees of the appeal" from Ms. Sweetin's funds if Gilbert "decides to file a mandamus action, or other form of appeal, for the previously entered order," which presumably refers to the April 30, 2004 Order in which the trial court, *inter alia*, adopted "on a temporary basis" the findings in the adult protective services proceedings that Ms. Sweetin was "a person in need of assistance for the care of her person and estate," appointed a special guardian, and ordered that the special guardian arrange a mental health evaluation of Ms. Sweetin so as to determine her capacity or incapacity. No allegation of errors are made regarding these costs or these findings in the initial petition in error.

find no abuse of the trial court's discretion or conclusion of law rendering erroneous the trial court's denial of the appellate attorney fees claimed. The order denying those fees is affirmed.[7]

*Attorney Fees Application After the Settlement*

¶19 Gilbert was present at a hearing on August 18, 2005, at which the trial judge, among other things, announced that requests for attorney fees were to be filed within 15 days for services rendered through the date of hearing, "except that this shall not apply to Mr. Fred P. Gilbert's currently pending application for attorney fees in connection with the Oklahoma Supreme Court Appeal number 100697," and accepted a settlement of other issues by the parties. An Order Appointing Guardian of Person Only and Conservator of Property (Consent Decree), *i.e.*, the August 18, 2005 Consent Decree, was filed that same day.

---

[7] We also noted that Gilbert's statement in his brief that his appeal is "for some $19,944.57, incurred in or with respect to Appeal 100,697" also is somewhat confusing, given the record. According to the transcript of hearing conducted on October 24, 2005, regarding attorney fees, this is the same amount the trial judge found was reasonable after considering "the value to the estate, the value to Ms. Sweetin, and the services rendered in addition to the normally (sic) hourly rate, the hours actually expended, and the hours that were necessary to spend," and an order attached to Gilbert's petition in error awarded him that precise amount.

¶20 The August 18, 2005 Consent Decree provides that "[a]ll attorneys of record shall have 15 days to file an application for attorney fees" excepting Gilbert's application for attorney fees for No. 100,697, and was signed by Gilbert. One certificate of service filed on August 18, 2005, by Ms. Sweetin's conservator states that a copy of the August 18, 2005 Consent Decree was hand-delivered to Gilbert on that date and a second signed that same date states that a copy was mailed to Gilbert.

¶21 Gilbert filed a Third Supplemental Application for Attorney's Fees and Request for Leave to File Out of Time on September 9, 2005. In his application he acknowledges the 15-day deadline in the August 18, 2005 Consent Decree but posits that "some mental quirk, amounting to 'excusable neglect'" caused him to think "that attorney's fee applications were due on September 15, 2005" rather than, as he "inadvertently discovered" on September 8, 2005, the fifteenth day following the August 18, 2005 hearing. He further notes that the 30-day "normal and usual time" for attorney fee applications would have run on Monday, September 19, 2005, and that this also caused him some confusion about when an attorney fee application was due.

¶22 In an order filed on September 16, 2005, the trial judge found that Gilbert's application was untimely, he had not shown grounds for modifying the August 18, 2005 Consent Decree, and the doctrine of excusable neglect did not apply. We agree.

¶23 The "normal," statutorily-set time for filing a request for attorney fees has no application here where a consent decree sets another time limit and that time limit is adopted as part of a judgment of the court. The August 18, 2005 Consent Decree is a settlement agreement of the parties which, once accepted by the court, is entered as a judgment; it is in the nature of a contract and may not be modified without the consent of the parties. *Whitehorse v. Johnson*, 2007 OK 11, 156 P.3d 41. Parties to a consent agreement may agree to do what the court may not otherwise do, so long as public policy is not contravened. *Whitehead v. Whitehead*, 1999 OK 91, 995 P.2d 1098. The agreement here to foreshorten the time which would otherwise apply to file an application for attorney fees does not violate any articulated public policy so as to render that agreement unenforceable. Gilbert does not demonstrate that any such consent to modify the August 18, 2005 Consent Decree exists, instead arguing he should be excused from its terms.

¶24 No abuse of any applicable discretion in failing to apply a statutory time limit for filing applications for attorney fees is shown on this record because such a time limit ceased to be a factor when the consent decree setting a different time limit was signed by the parties, was approved by the trial court, and became a judgment. At that point, the time limit was in the nature of a contract between the parties and not a matter for the application of discretion by the trial court. The August 18, 2005 Consent Decree

text addressing the deadline for the filing of claims for attorney fees is quite clear and sets a limit 15 days thereafter. Parties to a consent decree may agree to modify the terms of the agreement embodied in the judgment later entered but that circumstance is not present here. Gilbert has not demonstrated any agreement by the parties to modify the terms of the August 18, 2005 Consent Decree and has posited no legally cognizable reason for his failure to meet the agreed deadline. Accordingly, he has failed to demonstrate a basis for reversal of the trial court's determination and the order finding his application untimely is affirmed.

## CONCLUSION

¶25 The order denying the application for attorney fees for services provided in the trial court as untimely filed pursuant to limits agreed to in a consent decree which had become a judgment and for appellate attorney fees because the appeal in No. 100,697 was unnecessary is affirmed. Further, Gilbert's November 13, 2007 application for attorney fees of $7,425 for services relating to a Petition for Certiorari in this case, which includes the $100 filing fee for certiorari, and a separately filed application for costs including the same fee are denied.

AFFIRMED

JOPLIN, P.J., and MITCHELL, V.C.J., concur.

**RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF CIVIL APPEALS DIVISION III**

August 28, 2008

**THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:**

103,156 – In the Matter of the Guardianship of Mary Marie Sweetin, an alleged incapacitated person. Fred P. Gilbert, Appellant, vs. Robert S. Post, Special Administrator of the Estate of Mary Marie Sweetin, deceased, Appellee.

**Appellant's Petition for Rehearing is DENIED.**

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 28th day of August, 2008.

/s/ Larry Joplin
Larry Joplin
Presiding Judge

**IN THE DISTRICT COURT OF ROGERS COUNTY**
**STATE OF OKLAHOMA**

| | | |
|---|---|---|
| IN THE MATTER OF THE GUARDIANSHIP OF: Mary Marie Sweetin, an incapacitated person. | ) ) ) ) | NO. PG-2004-22 Judge: McBride |

**ORDER APPROVING ATTORNEY FEES**

(Filed Feb. 13, 2006)

COME NOW THIS 24th day of October, 2005 the applications for attorney fees filed by each of the attorneys of record in this matter as of August 18, 2005, and the Motion to Appoint Counsel for Respondent and Motion for Continuance filed herein on October 13, 2005, and the Motion for New Trial (Asserted Inapplicability of 12 O.S. 2006(B)) and/or Motion to Vacate Default Judgment (Regarding Attorney's Fees Application of 9 September 2005) filed herein on September 29, 2005, and the Motion for New Trial (Re Appellate Attorney's Fees), filed herein on June 24, 2005, and other matters for which separate orders have already been issued, Doris Breedlove appears in person and with former counsel of record Mike Woodward, Sandra Clark appears not but her former counsel of record Larry Rahmeier appears in person, John Ellison appears in person and with former counsel of record William Bowles, Fred Gilbert, still the Respondent's attorney for certain matters, and appears in person, J. Todd Willhoite, Conservator for Mary Marie Sweetin,

appears in person, Julia Neftzger appears not. The Court, having reviewed the record, having heard arguments of counsel, and being fully informed, does hereby FIND, ADJUDGE, AND DECREE AS FOLLOWS:

The Court overrules the Motion to Appoint Counsel for Respondent and Motion for Continuance filed herein on October 13, 2005.

The Court FINDS the attorney fee application filed herein by Ms. Julia Neftzger in the amount of $9,743.47 to be reasonable, the Court FURTHER FINDS the assets of Mary Marie Sweetin to be significant enough to pay said amount, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that $9,743.47 is awarded to Julia Neftzger from the assets of Mary Marie Sweetin under the power of 30 O.S. §4-403(A)(1).

The Court FURTHER FINDS that Sandra Clark, Doris Breedlove, and John Ellison are prevailing parties due to the August 18, 2005 Order Appointing Guardian of Person Only and Conservator of Property (Consent Decree) filed herein.

The Court FURTHER FINDS that pursuant to 12 O.S. §696.4, Sandra Clark is not entitled to attorney fees incurred prior to the October 21, 2005, Order ("Consent Decree") since she failed to file an application for attorney fees within thirty days of said date, however she is entitled to recover some costs prior to October 21, 2005, and as a prevailing party pursuant to 30 O.S. §4-761 she is entitled to attorney

fees after October 21, 2005 and the Court FINDS a reasonable amount of attorney fees to be $13,588.50 and $1,076.61 in costs for which the Court ADJUDGES, AND DECREES said amounts be paid from the assets of Mary Marie Sweetin to Sandra Clark for attorney fees and costs.

The Court FURTHER FINDS, ADJUDGES, AND DECREES that John Ellison as a prevailing party pursuant to 30 O.S. §4-761 is entitled to attorney fees and that the reasonable amount of attorneys fees is $20,000.00 plus reasonable costs in the amount of $926.98 and it is therefore ORDERED that the amount of $20,000.00 plus costs of $926.98 be paid from the assets of Mary Marie Sweetin to John Ellison.

The Court FURTHER FINDS, that the hourly rate of $195.00 charged by Mr. Woodward is excessive in the community for the type of work involved in this case and an appropriate hourly rate is $150.00 per hour for which this Court ADJUDGES, AND DECREES the award to Doris Breedlove for reasonable attorney fees is $19,140.00 plus costs of $2,344.45 from the assets of Mary Marie Sweetin, as per 30 O.S. §4-761 and 30 O.S. §4-403.

The Court has previously denied, per Order of September 15, 2005, Mr.Gilbert's "Third Supplemental Application for Attorney's Fees and Request for Leave to File Out of Time," filed herein on September 9, 2005 (which was four working days out of time). By his "Motion for New Trial (Asserted

Inapplicability of 12 O.S. 2006(B)) and/or Motion to Vacate Default Judgment," filed on September 29, 2005, Mr. Gilbert sought reconsideration thereof, for "excusable neglect," under 12 O.S. 2006(B), No other Party has filed an objection to Mr. Gilbert's said pleading(s), or disputed his affidavit of "excusable neglect," although in view of the Court's own *sua sponte* overruling (on October 15, 2005) of the said pleading(s) by Mr. Gilbert, no other Party really had either an obligation or opportunity to file an objection to Mr. Gilbert's said pleading(s). However, the Court finds 12 O.S. 2006(B), and that statute's reference to 'excusable neglect," to be legally inapplicable, for the reason that the relief requested, namely, leave to file out of time, would entail rewriting the Order of August 18, 2005, which had set fifteen days as the deadline for submitting attorney's fees applications, and for that reason the Court overrules Mr. Gilbert's said Motion for New Trial of September 29, 2005.

The Court also overrules Mr. Gilbert's other Motion for New Trial, filed on June 24, 2005, seeking reconsideration of this Court's denial (of June 2, 2005, formally filed on June 10, 2005) of his Renewed Application for Appellate Attorney's Fees, filed herein on May 31, 2005, and relating to Mr. Gilbert's efforts and expenses on behalf of Ms. Sweetin in Appeal No. 100,697, docketed in the Supreme Court of Oklahoma on May 17, 2004, and later (on May 23, 2005) dismissed as moot by the Supreme Court (based on the interim recusal, of June 15, 2004, of the previous Judge presiding herein). That "Renewed Application

for Appellate Attorney's Fees" was denied orally by the Court on June 2, 2005, and denied formally by the written Order to that effect filed on June 10, 2004. On June 24, 2005, Respondent's counsel, Mr. Gilbert, filed a Motion for New Trial therefrom, together with a concurrent Motion for Extension of Time to File the Memorandum in Support thereof, which Motion for Extension was granted on July 8, 2005 (per the written Order formally filed on or about July 13, 2005); and which supporting Brief was filed herein on October 10, 2005.

In consideration whereof, the Court overrules the Respondent's said Motion for New Trial (Re Appellate Attorney's Fee), for the reason that the said Appeal 100,697 later turned out to have been unnecessary, and also for the reason that Mr. Gilbert had been well paid for other services performed for Ms. Sweetin.

The Court does acknowledge Mr. Gilbert's previously pending application for attorney fees in the amount of $19,944.57, which the Court finds reasonable and ORDERS that Mr. Fred Gilbert be paid $19,944.57 for attorney fees from the assets of Mary Marie Sweetin. The Court FURTHER ORDERS AND DECREES, that Fred Gilbert provide an accounting to Mary Marie Sweetin's conservator for the $5.000.00 earlier paid from the assets of Mary Marie Sweetin to Mr. Gilbert for payment of costs of the litigation.

The Court FURTHER FINDS that the cash available to pay said claims is insufficient at this time

to pay all awards in full, however the conservatorship estate of Mary Marie Sweetin is expecting to receive cash in the near future to pay the balance of all claims. With the exception of Julia Neftzger, who was not present, the other parties present have announced their agreement to waive any interest on today's award for ninety days.

IT IS SO ORDERED THIS 24th day of October, 2005.

Signed 2-13-06

/s/ [Illegible]
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

Fred Gilbert, OBA#3362
Attorney for Respondent

Larry Rahmeier, OBA#10448
Former Attorney for Sandra Clark

Mike Woodward, OBA#17204
Former Attorney for Doris Breedlove

William Bowles, OBA#1005
Former Attorney for John Ellison

/s/ J. Todd Willhoite
J. Todd Willhoite, OBA#14840
Conservator

Julia Neftzger, OBA#
Guardian and former Co-Counsel
for Mary Marie Sweetin

**IN THE DISTRICT COURT OF ROGERS COUNTY**
**STATE OF OKLAHOMA**

| | | |
|---|---|---|
| IN THE MATTER OF THE GUARDIANSHIP Of: | ) | NO. **PG-2004-22** |
| MARY MARIE SWEETEN, An Incapacitated Person. | ) | |

**ORDER SETTING HEARING**

Now on this 15th day of September, 2005, the court having examined and considered all the files and records in the case, the pleadings submitted, and being fully advised in the premises, in the above entitled and numbered case, FINDS:

1. That the Third Supplemental Application for Attorney's Fees submitted by Mr. Fred Gilbert, filed of record on September 9, 2005, is untimely and should not be considered by the Court. The Order Appointing Guardian (Consent Decree) entered by the Court on August 18, 2005, by the agreement of all parties, specifically restricts all attorney fee applications to be submitted within fifteen (15) days from the entry of said Order. To enlarge the time to file attorney fees would require a modification of the Order entered and there has been no showing of grounds to modify said order. The Court finds that the doctrine of Excusable Neglect does not apply. The previous Applications for Attorney fees filed by Mr. Fred Gilbert will however be

considered as they were filed of record prior to the conclusion of the substantive proceedings herein.

2. That the Applications for Attorney Fees submitted by:
-Ms. Julia Neftzger on behalf of the Ward;
-Mr. Larry Rahmeier on behalf of Ms. Sandra K. Clark; and
-Mr. William A. Bowles on behalf of Mr. John Ellison, should be set for hearing.

3. That the Annual Accounting, Request for Appointment of Appraisers, and Request for Conservator's Compensation should be set for hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the COURT, that the Conservator's Request for Compensation, Application for Appointment of Appraisers, and Annual Accounting, as well as the Applications for Attorney Fees as set forth above are hereby set for Hearing on the 13th day of October, 2005, at the hour of 9:30 o'clock A.M.

/s/ [Illegible]
Terry H. McBride
Associate District Judge

IN THE DISTRICT COURT IN AND
FOR ROGERS COUNTY
STATE OF OKLAHOMA

| | |
|---|---|
| IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF MARIE SWEETIN, aka MARY MARIE SWEETIN, AN INCAPACITATED PERSON. | ) Case No. PG-2004-22<br>) Judge Terry McBride |

**ORDER**

(Filed Jun. 10, 2005)

NOW on this 2nd day of June, 2005, this cause comes before the Court on Respondent, Mary Marie Sweetin's, **EMERGENCY APPLICATION FOR INJUNCTION TO MRS. DORIS BREEDLOVE, LIMITED GARDIAN FOR MS. MARY MARIE SWEETIN, RESPONDENT, TO RETRACT "DO NOT RESUSCITATE" ORDER(S) AND TO RETRACT ALL "NO SHOW, NO REPORT" ORDERS TO ST. FRANCIS HOSPITAL AND TO ALL OTHER HEALTH CARE PROVIDERS FOR RESPONDENT, MS. SWEETIN.** Present were Fred Gilbert, on behalf of the Respondent, Mary Marie Sweetin, who did not personally appear; Ms. Julia Neftzger, co-counsel for the Respondent, Mary Marie Sweetin; Mr. Larry Rahmeier, counsel for original petitioner, Ms. Sandra Clark; Mr. Michael C. Woodward, counsel for Limited Guardian, Ms. Doris

Breedlove; Mr. William A. Bowles, counsel for Mr. John Ellison; Mr. Todd Willhoite, temporary conservator for the Respondent, Mary Marie Sweetin; and Ms. Yvonne Fisher Glick, counsel for the Oklahoma Department of Human Services. The Court heard the partial testimony of one sworn witness and conducted a lengthy discussion with all counsel of record in chambers and at the conclusion of which issued the following:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Doris Breedlove will remain the Limited Guardian of the person of Mary Marie Sweetin for medical purposes until further order of this Court pursuant to the Consent Decree filed in this matter on October 22, 2004, with the following qualifications and/or clarifications;

a. Mary Marie Sweetin is to continue residing in the nursing home that she is currently in (Mayfair, Tulsa, Oklahoma);

b. Mary Marie Sweetin will not be removed for home visits or for any other reason except for necessary trips out of the nursing home for medical reasons as approved by Ms. Sweetin's doctors and shall only be transported by the nursing home staff or other qualified transporter;

c. John Ellison and Doris Breedlove will have equal access to Ms. Mary Marie

Sweetie for visitation. It will be up to the nursing home to establish a schedule between the two of them to avoid conflict or overtiring Ms. Sweetin. If any problems arise which cannot be resolved among the parties; the Court will resolve any such conflicts upon application of any party;

d. Mary Marie Sweetin's whereabouts is to be known at all times by the appropriate staff at the nursing home; and

e. If Mary Marie Sweetie is released from the nursing home prior to resolution of this matter by the Court, application will be made to this Court for determination of her living-arrangements at that time.

2. Concerning Mr. Ellison's Motion to Substitute himself as the Guardian of Mary Marie Sweetin, the Court orders as follows:

a. Mr. Ellison's application is set for hearing on Thursday and Friday, July14 and 15, 2005;

b. Discovery must be completed by July 1, 2005 and all parties are to expedite the completion of any discovery requests by any party;

c. The Oklahoma Department of Human Services is to release all records in its possession pursuant to a separate order of this Court and any subpoenas to DHS

workers shall also be sent to the Oklahoma Department of Human Services Assistant General Counsel, Yvonne Glick;

3. The Temporary Restraining Order filed on behalf of Mary Marie Sweetin is to remain in effect until further order of this Court and no proceedings shall be brought in any other forum for resolution of any matters relating to this matter.

**4. The Application of Fred Gilbert for appellate attorneys fees incurred on behalf of Mary Marie Sweetin is denied.** (Emphasis added.)

5. The Application for attorneys fees of Michael C. Woodward will be ruled upon at a future date.

6. The Application of the conservator of Mary Marie Sweetin, Mr. Todd Willhoite, for permission to sell property of the Ward, shall be decided at a later date.

7. Payments to Doris Breedlove shall cease during any period of time that Mary Marie Sweetin is receiving around-the-clock care in a nursing home, or other medical facility.

8. The Court will take under advisement the requests to surcharge Ms. Breedlove for payments received while Mary Marie Sweetin was previously receiving 24 hour care in a nursing home or hospital.

**9. The motion of Doris Breedlove through her attorney, Michael Woodward, to disqualify**

**Fred Gilbert for conflict does not arise to the level requiring court attention and the Court denies the motion.** (Emphasis added.)

10. The Court orders that each attorney of record in this matter shall be entitled to receive pertinent medical records concerning Mary Marie Sweetin and a separate order will be issued for that purpose.

/s/ [Illegible]
Terry McBride, Judge

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

**MONDAY, FEBRUARY 2, 2009**

**THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:**

103,156 In the Matter of the Guardianship of Mary Marie Sweetin, an alleged incapacitated person; Fred Gilbert v. Robert Post, Special Administrator of the Estate of Mary Marie Sweetin, Deceased
**Petition for certiorari is denied.**
CONCUR: Edmondson, C.J., Taylor, V.C.J., Hargrave, Kauger,Watt, Winchester, Colbert, Reif, JJ.
DISSENT: Opala, J.

* * *

/s/ [Illegible]
**CHIEF JUSTICE**

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| IN THE MATTER OF THE GUARDIANSHIP OF MARIE SWEETIN, A/K/A MARY MARIE SWEETIN. | ) ) ) ) | Case No.: **PG-2004-22** |

* * *

TRANSCRIPT OF PROCEEDINGS
HAD ON THE
2ND DAY OF JUNE, 2005
BEFORE THE
HONORABLE TERRY H. McBRIDE
ASSOCIATE DISTRICT JUDGE

(Filed Sept. 6, 2006)

* * *

REPORTED BY:
RHONDA LANE, TCSR, #1853
Temporary Certified Shorthand Reporter
Temporary Official Court Reporter
Mayes County District Courthouse
1 Court Place, Suite 210
Pryor, Oklahoma 74361

**APPEARANCES**

***FOR THE DEPARATMENT OF HUMAN SERVICES:***

MS. YVONNE FISHER GLICK
DEPARTMENT OF HUMAN SERVICES,
907 S. DETROIT AVENUE, SUITE 906
TULSA, OKLAHOMA 74120

***FOR MR. ELLISON*:**

MR. WILLIAM A. BOWLES
ATTORNEY AT LAW
520 WEST 6TH STREET
POST OFFICE BOX 1046
TULSA, OKLAHOMA 74101

***CO-COUNSEL FOR THE WARD*:**

MR. FRED P. GILBERT
ATTORNEY AT LAW
406 SOUTH BOULDER, SUITE 830
TULSA, OKLAHOMA 74103-3825

MS. JULIA NEFTZGER
ATTORNEY AT LAW
COURT AND VANN
POST OFFICE BOX 368
PRYOR, OKLAHOMA 74361

***THE CONSERVATOR:***

MR. JOHN TODD WILLHOITE
ATTORNEY AT LAW
415 WEST PATTI PAGE BOULEVARD
CLAREMORE, OKLAHOMA 74017

***FOR THE LIMITED GUARDIAN*:**

MR. MICHAEL C. WOODWARD
ATTORNEY AT LAW
2727 EAST 21ST STREET
TULSA, OKLAHOMA 74114-3505

[3] **INDEX**

CHERI LANE

DIRECT EXAMINATION BY MR. WOODWARD ..... 16

MR. GILBERT'S RENEWAL APPLICATION FOR APPELANT ATTORNEY FEES ..... 37

MR. WOODWARD'S APPLICATION FOR ATTORNEY FEES ..... 39

CERTIFICATE OF THE COURT REPORTER ..... 48

* * *

[37] THE COURT: Now, we have the Renewed Application for Appellant Attorney Fees filed by Ms. Sweetin, or at least by her attorney Mr. Gilbert. I've already indicated to Mr. Gilbert that I have read your application, and your brief in its entirety, and reviewed the fees.

The Court finds in that regard, that the Appeal was in fact unnecessary in this case. The Court is not going to speculate, although the Court does commend Mr. Gilbert on the arguments that he makes in the – in the brief, and the Court can certainly understand where Mr. Gilbert is coming from. However, the Court is not going to speculate as to the reasons for Ms. – Judge Steidley's recusal, and all of the matters were resolved. Mr. Gilbert has been compensated, extensively for the litigation of the aspect of – who Ms. Sweetin's attorney would be, and the Court finds that Appeal, which the Court also

notes was dismissed as moot – was unnecessary. And, the request for Appellant Attorney's Fees is denied.

Did you wish to make a record on that Mr. Gilbert?

MR. GILBERT: Yes, Your Honor. I would ask – and, this is the only copy I have. But, it's in the record. It was attached to my Reappearance in this Court. The contract signed by Ms. Sweetin on February the 17th – I'll pass this up to the Court. I'd just ask the Court to take notice of the first paragraph there, and I don't know why I [38] didn't put it in the brief.

Now, there is going to be some question that she wasn't competent to sign that, as I think I've indicated – I did, not have it typed up this way. But, that was executed in the presence of Carla Jackson, who was the Director of the – in fact, maybe we just ought to go ahead and let me call – call this just Exhibit 1, but, anyway –

THE COURT: This is in the file. I believe you filed it in the case; did you not?

MR. GILBERT: I filed it as an attachment to my Re-Appearance.

THE COURT: Okay. The Court will consider the contract as a part of it's decision.

MR. GILBERT: All right. And, in case there is any challenge, I would ask leave to call, or subpoena

Ms. Carla Jackson to verify she was there. That she did sign it of her own free will.

Now, the grumbling was over the Appellant fees. She almost didn't sign it for that reason. I told her, I said all right, Judge, I mean, Ms. Sweetin, you do whatever you want to, but I can not fully rep – help you much further if I don't get your cooperation on the attorneys fees. And, we discussed it. She couldn't pay them, because of the conservator in place, but I expected her support, and I was on my way out, and Ms. Jackson said, Mr. Gilbert, she just [39] said she would sign it.

THE COURT: Okay. Mr. Gilbert, I appreciate your argument and your position. I understand that. The Court is denying those fees for the reasons stated. If you wish to use that as grounds to withdraw as Ms. Sweetin's attorney, I would, you know, entertain that. This Court feels like you've been compensated adequately for your services. I understand up through where your last application was in the District Court, I understand you have provided more services, which I'm sure the Court will consider compensating you for those. But, as for the Appeal related fees that's submitted, your application is denied.

MR. GILBERT: All right, Your Honor.

THE COURT: Okay. And, in – also, Mr. Woodward has filed an Application for Attorneys Fees, and there has been an objection filed. We've had a discussion in Chambers on that. I believe, Mr.

Woodward is going to contact Mr. Smolen, and we will take that up at a later date. So, we will take that Application under advisement.

There was some indication, Mr. Gilbert, also intends to file another Application for District Level Attorney Fees. When those are filed, perhaps we can sit those together prior to trial.

Mr. Willhoite has asked for some direction I believe in regarding to the sale of some property.

* * *

[48] **CERTIFICATE**

STATE OF OKLAHOMA, )
) ss.
COUNTY OF MAYES, )

I, Rhonda Lane, a Temporary Certified Shorthand Reporter, TCSR No.1853, in and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct transcription of my shorthand notes taken in PG-2004-22, held on the 2ND day of JUNE, 2005, before the Honorable Terry H. McBride.

I further certify that I am not related to, attorney for, nor am I otherwise interested in the events of the said action.

**WITNESS MY HAND AND SEAL** this 6th day of September, 2006.

/s/ Rhonda Lane
RHONDA LANE, TCSR
Temporary Certified Shorthand Reporter
Temporary Official Court Reporter
TCSR No. 1853

**IN THE SUPREME COURT**
**OF THE STATE OF OKLAHOMA**

In the Matter of the Guardianship
of
MARY MARIE SWEETIN,
an alleged incapacitated person,
*Respondent/Appellant.*
[SANDRA K. CLARK,
*Petitioner/Appellee*]

No. 103, 156

FRED P. GILBERT,
*Applicant-Appellant,*
*versus*
ROBERT S. POST,
Special Administrator of the Estate of Mary Marie Sweetin, deceased,
*Appellee.*

Rogers Co. Dist Ct.
No. PG-2004-22

FRED P. GILBERT
830 Beacon Building
406 S. Boulder
Tulsa, Oklahoma 74103-3825
(918) 583-4276
*Attorney for Appellant*

**PETITION FOR A WRIT OF CERTIORARI (TO THE COURT OF APPEALS, DIVISION III)**

(Filed Sept.19, 2008)

ATTORNEY'S FEES FOR ELDERLY/AGED WARDS CONTRACTUAL CAPACITY TO RETAIN COUNSEL FOR DEFENSE OF LIBERTY STATE IMPAIRMENT OF THE OBLIGATIONS OF CONTRACTS

* * *

The Supreme Court should grant review to resolve and clarify following issues:

1. (a) Primarily: **Does the alleged incompetent (or "incapacitated person") [frequently an elderly or aged citizen] retain a residual competency to *contract* with a private attorney of the oldster's own choosing for legal representation in a guardianship proceeding, for the defense of the prospective ward's own liberty – or even, in the case of an already-adjudicated incompetent, or "incapacitated person," if the purpose of the contemplated retention is to seek a restoration to competency, and hence, to re-achieve the oldsters' full (or fuller) liberty?** And,

(b) **If that residual competency includes the right to *contract* for legal services/ representation with a privately-selected lawyer (as opposed to the vaguer "retain," "obtain," "be represented by" counsel, or the**

**like) "defeasible" (or "impairable"), at the Guardianship Judge's personal whim and caprice, as under 30 O.S. 4-103(A)(1) and 4-103(C). as construed and applied in this case, given the overriding prohibition as contained in both the United States Constitution, Art. I, Sec. 10, para. 1,[2] and by Art. II, Sec. 15, to our State Constitution, expressly forbidding the enactment of "any Law . . . impairing the Obligation of Contracts . . . "?**

---

[2] Restored, after decades of disregard and *de facto* oblivion, to full and honorable participation in the Supreme Law of the Land as an active provision of our Constitution, by the decision in *United States Trust Company of New York v. New Jersey* (1977) 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505

**IN THE COURT OF CIVIL APPEALS**
**OF THE STATE OF OKLAHOMA**
**DIVISION III**

| | |
|---|---|
| In the Matter of the Guardianship of<br>MARY MARIE SWEETIN,<br>an alleged incapacitated person,<br>*Respondent/Appellant.*<br>[SANDRA K. CLARK,<br>*Petitioner/Appellee*] | |
| | No. 103,156 |
| FRED P. GILBERT,<br>*Applicant-Appellant,*<br>*versus*<br>ROBERT S. POST,<br>Special Administrator of the Estate of Mary Marie Sweetin, deceased,<br>*Appellee.* | Rogers Co. Dist Ct.<br>No. PG-2004-22 |

**APPELLANT'S PETITION FOR REHEARING**

(Filed Aug. 21, 2008)

COMES NOW, Appellant, FRED P. GILBERT, formerly attorney for Ms. Mary Marie Sweetin, now deceased, and respectfully moves this Honorable Court to Rehear its Opinion herein, rendered on July 11, 2008, for the following reasons:

* * *

If Section 4-403(A)(1) is not applicable, then the Guardianship Judge's "authority to "impair the obligation" of such a contract (per 30 O.S. 4-403(D)) does not apply at all to Ms. Sweetin's contracts with Fred Gilbert; or, if Section 4-403 as a whole does purport to vest in the Guardianship Judge the "authority to impair the obligation" of the Sweetin-Gilbert contract(s) at bar, then the said statute purports to vest precisely such "impairment" power in the Guardianship Judge as is squarely forbidden by the Impairment of the Obligation of Contracts Clause of the U.S. Constitution [Art. I, Sec. 10, para. 1] and/or of the Oklahoma Constitution [Art. II, Sec. 15]. Either way, the Guardianship Judge's "disapproval" or "denial" – at least of counsel's fees incurred for Appeal No. 100,697 – was void (or at least voidable) as a matter of law – yet the Court has overlooked both of these legal points, duly discussed in counsel's Brief at pp. 1-11 thereof.

* * *

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**IN THE SUPREME COURT**
**OF THE STATE OF OKLAHOMA**

| | |
|---|---|
| In the Matter of the Guardianship of<br>MARY MARIE SWEETIN,<br>an alleged incapacitated person,<br>*Respondent/Appellant.*<br>[SANDRA K. CLARK,<br>*Petitioner/Appellee*] | |
| | No. 103,156 |
| FRED P. GILBERT,<br>*Applicant-Appellant*,<br>*versus*<br>ROBERT S. POST,<br>Special Administrator of the Estate of Mary Marie Sweetin, deceased,<br>*Appellee.* | Rogers Co. Dist Ct.<br>No. PG-2004-22 |

FRED P. GILBERT
830 Beacon Building
406 S. Boulder
Tulsa, Oklahoma 74103-3825
(918) 583-4276

*Attorney for Appellant*

(Filed Dec. 12, 2006)

**APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY**
The Hon. Terry H. McBride,
Associate District Judge, Presiding
(District Court Case No. PG-2004-22)

ATTORNEY'S FEES FOR ELDERLY/AGED WARDS
CONTRACTUAL CAPACITY TO RETAIN
COUNSEL FOR DEFENSE OF LIBERTY
STATUTORY IMPAIRMENT OF THE
OBLIGATIONS OF CONTRACTS

**TABLE OF CONTENTS**

INDEX TO CITATIONS ..... ii

SUMMARY OF THE RECORD ..... 1

ARGUMENT ..... 2

PROPOSITION I: THE ELDERLY, THE AGED AND THE INFIRM ENJOY A STATUTORY "RESIDUAL COMPETENCY" TO *CONTRACT* FOR A LAWYER'S REPRESENTATION IN DEFENSE OF THE OLDSTER'S *LIBERTY*; THAT HAPPENED IN THIS CASE; AND BECAUSE OF THE CONSTITUTIONAL PROHIBITION AGAINST "THE IMPAIRMENT OF THE OBLIGATIONS OF CONTRACTS," THE DISTRICT COURT'S PURPORTED "VETO" OR "RENEGOTIATION" OF THE CONTRACTUAL OBLIGATIONS BETWEEN CLIENT AND COUNSEL HEREIN – I.E., THE ATTORNEY'S FEES EARNED UNDER THE CONTRACT OF RETENTION, WAS VOID, AND MUST BE REVERSED ..... 2

A. The Immediate Question ..... 2

B. The Relationship between Attorney Fred Gilbert and Ms. Sweetin was Contractual... 4

C. The Prohibitions Contained in the "Impairment of the Obligations of Contract" Clauses ..... 11

* * *

**IN THE SUPREME COURT**
**OF THE STATE OF OKLAHOMA**

| | |
|---|---|
| In the Matter of the Guardianship of<br>MARY MARIE SWEETIN,<br>an alleged incapacitated person,<br>*Respondent/Appellant.*<br>[SANDRA K. CLARK,<br>*Petitioner/Appellee*] | |
| | No. #103156 |
| FRED P. GILBERT,<br>*Applicant-Appellant*,<br>*versus*<br>ROBERT S. POST,<br>Special Administrator of the Estate of Mary Marie Sweetin, deceased,<br>*Appellee.* | Rogers Co. Dist Ct.<br>No. PG-2004-22 |

**PETITION IN ERROR**

(Filed Mar. 15, 2008)

[[✓]] PETITION IN ERROR
[[ ]] AMENDED OR SUPPLEMENTAL PETITION
[[ ]] CROSS PETITION
[[ ]] COUNTER-PETITION
DATE FIRST PETITION IN ERROR FILED:

* * *

EXHIBIT C – ISSUES TO BE RAISED

1. Whether an incapacitated person, or a partially incapacitated person, may hire, retain, and/or ***contract*** *with* a private attorney for the defense of the person's liberty?

2. Whether such a contract is subject to a guardianship judge's "veto power" under 30 O.S. 4-403, or whether such contractual obligations cannot be impaired at the State level by the Federal and State guarantees against the impairment of the obligations of contracts, per U.S. Const., Art. I, Sec. 10, Para. 1, and Oklahoma Constitution, Art. II, Sec. 15?

* * *

**IN THE DISTRICT COURT IN AND FOR ROGERS COUNTY STATE OF OKLAHOMA**

| | |
|---|---|
| **In the Matter of the Guardianship of MARY MARIE SWEETIN, an alleged incapacitated person,** ***Respondent.*** | **No. PG-2004-22** |

**RESPONDENT'S BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL (RE APPELLATE ATTORNEY'S FEES)**

(Oct. 10, 2005)

FRED P. GILBERT
830 Beacon Building
406 S. Boulder
Tulsa, Oklahoma 74103-3825
(918) 583-4276

*Attorney for Appellant*

**ON MOTION FOR NEW TRIAL**
The Hon. Terry H. McBride,
Associate District Judge
(Sitting by Designation)

DENIAL *IN TOTO* OF
APPELLATE ATTORNEY'S FEES

* * *

And let counsel now voice a few thoughts on the "Impairment of the Obligations of Contracts" prohibitions of our National and our State Constitutions [Art I, Sec. 10, para. 1, and Art. II, Sec. 15]). It is true that over the course of the Twentieth Century, so much "social" legislation was passed, and upheld, banning (and voiding contracts which provided for) child labor, setting compensation below some "minimum wage," forbidding an employee to join a labor union, etc., that by the 1970's it was the "activist" or the "liberal" view in certain juridical circles that the Impairment of the Obligations of Contracts Clause(s) were simply "dead letters," and scarcely even a part of the Constitution(s) any longer. However, in 1977, the U.S. Supreme Court held void by reason thereof certain legislation by New Jersey and New York which had repealed certain pre-existing contractual provisions and guarantees with certain bondholders of the New York Port Authority to earmark certain revenues for retirement of those bonds. *United States Trust Company of New York v. New Jersey* (1977) 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505, which forcefully "breathed life back into" the Impairments of the Obligations of Contracts Clause – and remains the leading case today on the continuing viability of that Clause. Counsel will not bore the Court with the details from that case (which the Court can read for itself), but counsel would invite attention to the howls of protest from the "liberal" Justices, in their dissent, 431 U.S. at 33, 44-45, at how the U.S. Supreme Court could possibly have been so presumptuous as to void

"public interest" legislation by invoking a clearly outdated and obsolete Clause to the Constitution.

Enough said. The Court's actions herein, and the underlying 30 O.S. 4-304(D) clearly violate the Clauses of both our State and our National Constitutions.

* * *

IN THE DISTRICT COURT IN
AND FOR ROGERS COUNTY
STATE OF OKLAHOMA

| | |
|---|---|
| In the Matter of the Guardianship of<br>MARY MARIE SWEETIN,<br>an alleged incapacitated person,<br>*Respondent.* | No. PG-2004-22 |

**MOTION FOR NEW TRIAL**
**(ASSERTED INAPPLICABILITY OF**
**12 O.S. 2005(B))**
**and/or**
**MOTION TO VACATE DEFAULT JUDGMENT**
**(REGARDING ATTORNEY'S FEES**
**APPLICATION OF 9 SEPTEMBER 2005)**
**with**
**SUPPORTING MEMORANDUM**

(Filed Sept. 29, 2005)

COMES NOW Respondent, MARY MARIE SWEETIN, and pursuant to 12 O.S. 651 et seq, and 1031-1034, hereby seeks a new trial (or, more precisely, reconsideration) of the Court's Order of September 15, 2005, disallowing leave for counsel to file this Third Application for Attorney's Fees, of September 9, 2005, out of time.

In support of this instant Motion, counsel would allege as follows:

* * *

Another facet of this whole litigation which everyone has evidently succeeded in overlooking so far is that the retention (to include compensation) relationship between Ms. Sweetin and undersigned counsel is *contractual*, per *In re Bradshaw* (Okla., 1980) 606 P.2d 578, *Towne v. Hubbard* (Okla., 2000) 3 P.3d 145; 30 O.S. 3-107(E)(2), 30 O.S. 3-107(D), and 30 O.S. 3-219 (as is in the process of being briefed more fully in Respondent's forthcoming Brief in Support of the Motion for New Trial regarding appellate attorney's fees). Thus, counsel's *contractual* claim for attorney's fees is in marked contrast to the other attorneys' and litigant's claims for attorney's fees herein, under 30 O.S. 4-403, which is primarily for appointed attorneys and others feeling that they have some claim on Ms. Sweetin's monies; and which relationship counsel is calling the "quasi-contractual" or "quantum meruit" basis for seeking an court award of attorney's fees and expenses from a ward.

Since counsel's relationship to the Respondent is by way of a formal, written contract (actually, at least two contracts), counsel's contractual relationship with Ms. Sweetin is not only protected by the "Impairment of the Obligations of Contract" clauses of both the U.S. and the Oklahoma Constitutions (Art. I, Sec. 10, Para. 1 (U.S.), and Art II, Sec. 15 (Oklahoma)), but also by the five-year statute of limitations for collecting amounts owed thereunder, per 12 O.S. 95(1).

* * *

---

Claremore, Oklahoma
~~April 13, 2004~~
May 10, 2004

CONTRACT FOR LEGAL SERVICES

I, MARY MARIE SWEETIN, of Rogers County, Oklahoma, do hereby hire and retain Mr. Fred Gilbert, Attorney at Law, of Tulsa, to be my personal and private attorney, to defend me and my liberty in the following lawsuits now pending in Rogers County District Court, namely,

Case No. PSE-2004-5

Case No. CJ-2004-179

Case No. PG-2004-22

wherein various people are attempting to have me declared an incapacitated person, or a partially incapacitated person, or a vulnerable adult, and to have me subjected to a guardian, or limited guardian, of both my person and my estate, on the assertion that my mind is deteriorating.

My broad instructions to Mr. Gilbert are to raise on my behalf every legal defense allowed under the law, and to investigate and pursue whatever factual defenses I may have. I have come into contact with Mr. Gilbert due to my request, while I was recently confined against my will in the Craig Memorial Hospital in Vinita, voiced by me to my friend Evelyn Bagwell and to my niece Doris Breedlove, when they visited with me several times, to "get me a lawyer to get me out of here." I am informed that they

contacted Mr. Gilbert, because they knew that Mr. Gilbert has been the attorney for my friend, Mr. John Ellison, for some time, on other and unrelated matters.

I agree to Mr. Gilbert's standard rate for cases such as this of $150.00 per hour of work (to include travel), plus his out-of-pocket expenses. I further agree to an initial retainer for Mr. Gilbert of Ten Thousand Dollars ($10,000.00), part of which he informs me will necessarily go to obtaining medical and psychiatric expert witnesses. Mr. Gilbert informs me that his bills to date on my behalf are "ballpark" around Five Thousand Dollars ($5,000.00).

I am further advised that Mr. Gilbert's fee for defending me may exceed the initial Ten Thousand Dollars ($10,000.00).

/s/ Mary Marie Sweetin
MARY MARIE SWEETIN

ACCEPTED:

/s/ Fred Gilbert
FRED GILBERT
~~13 APRIL 2004~~
10 May 2004

Claremore, Oklahoma
May 21, 2004

I, Mary Marie Sweetin, do again select Mr. Fred Gilbert, of Tulsa, to be, and to continue to serve as, my appellate counsel in Oklahoma Supreme Court Appeal No. 100,697.

I also desire Mr. Gilbert to continue as my lead attorney in my Guardianship and related cases in the District Court of Rogers County, in accordance with my contract with Mr. Gilbert of May 10, 2004.

/s/ Mary Marie Sweetin
May 21-2004

STATEMENT

I, Mary Marie Sweetin, the Respondent in Rogers County Case PG-2004-22, wherein my niece, Mrs. Sandra Clark, is seeking to have me declared either incapacitated, or partially incapacitated, and thereby to secure control of my property and of my person, personal life, and personal liberty, do hereby State that:

1. I am aware that on or about July 19, 2004, my attorney in the said Guardianship case, Mr. Fred Gilbert, of Tulsa, filed an "Application for Order Directing Disbursement of Attorney's Fees" in the said Guardianship case, for fees beginning with the commencement of Mr. Gilbert's services in the said Guardianship case (and in the ancillary Appeal arising therefrom, Oklahoma Supreme Court Case No. 100,697) through the end of June, 2004.

2. I know that the foregoing is correct because Mr. Gilbert stopped by my house on the way home from filing that Application the same day he filed it, gave me a copy, and told me what it was. However, we did not discuss that Application in any great detail at that time, but I did receive it, and I was informed what it was.

3. By the said Application, Mr. Gilbert states that he expended (through the end of June, 2004) some 167.25 "billable" hours on my behalf in the Guardianship case (Rogers County, No. PG-2004-22), and some 92.50 hours on the Appeal (Okla.Sup., No. 100,697).

At the agreed-upon rate of $150.00 hour (to include travel time), that amounts to, as follows:

| | |
|---|---|
| PG-2004-22 | $25,087.50 |
| 100,697 | 13,875.00 |

For a total attorney's fee bill of

$38,962.50.

4. In addition, I see that Mr. Gilbert has also stated that he has incurred expenses in the two said cases as follows:

| | |
|---|---|
| PG-2004-22 | $886.68 |
| 100,697 | 715.04 |

for total out-of-pocket expenses of

$1,601.72.

5. Adding these expenses to Mr. Gilbert's "hourly rate" bill yields a gross total of

$40,564.11.

6. However, on June 21, 2004, Judge McBride ordered an advance of $5,000.00 to be paid to Mr. Gilbert; and since that time, Mr. Gilbert has received an additional $400.00 from another source for application onto my overall bill, the difference or unpaid balance therefor amounting to:

$35,164.22,

which Mr. Gilbert's said Application seeks payment for (through the end of June, 2004).

7. While I cannot tell whether everything that Mr. Gilbert has done for me was "reasonable and necessary," I have no problem with the statements as such, or the amount of hours expended and expenses incurred; and the hourly rate of $150.00 per hour (to include travel time), plus out-of-pocket expenses, is within the terms of the Contract which I signed with Mr. Gilbert on or about May 10, 2004.

8. I recognize that Mr. Gilbert has had to contend with and overcome the former Judge herein, who certainly acted in a manner hostile to my personal liberty, and even to my right to select and retain my own private attorney.

9. While the amount expended on this litigation thus for ("ballpark" $40,000) is substantial, especially for an elderly single woman whose cash assets (at the outset of this litigation) were only somewhat upwards of about $130,000, I feel that this bill should and must be paid, and as promptly as possible.

10. I therefore concur with and support Mr. Gilbert's current Application for Order Directing Disbursement of Attorney's Fees," in the remaining unpaid amount of $35,164.22; and request that this bill be paid as soon as possible.

11. However, I have no objection to the Judge's looking over Mr. Gilbert's statements, and directing such inquiry as His Honor may see fit to address to Mr. Gilbert about any portion of Mr. Gilbert's statements; and I am informed that Mr. Willhoite (my Temporary Special Guardian) has voiced similar thoughts (Mr.

Gilbert has furnished me with a copy of Mr. Willhoite's "Objection to Application for Attorney's Fees," filed herein on August 24, 2004).

12. This concurrence with Mr. Gilbert's present Application is to be construed as "without prejudice" to any application for attorney's fees which I may hereafter see fit to file.

/s/ Mary Marie Sweetin
Mary Marie Sweetin
Date: August 26 2004

WITNESS:

/s/ Doris Breedlove
Doris Breedlove

Tulsa, Oklahoma
Date: 17 Feb. 2005

CONTRACT FOR LEGAL SERVICES

I, MARY MARIE SWEETIN, of Rogers County, Oklahoma, do hereby re-hire and re-retain Mr. Fred Gilbert, Attorney at Law, of Tulsa, to be my personal and private attorney, to defend me and my liberty in the following lawsuit now pending in Rogers County District Court, namely, Case No. PG-2004-22, and in the Supreme Court of Oklahoma, namely, Appeal No. 100,697, and in such other related litigation (relating to my personal liberty) as has heretofore been filed, or may hereafter be filed, to include Rogers County District Court Case Nos. PSE-2004-5, and CJ-2004-179.

The gist of this litigation is to the effect, certain people have been alleging, that I either am now or am becoming incompetent, incapacitated, or partially incapacitated, and in more particular (they say) that I am losing my mind, or part of my mind; and wherefore, they say, I am in need, or continuing need, of a guardian, a limited guardian, and a conservator.

For Mr. Gilbert's legal efforts in defending, and continuing to defend, my legal liberty, I agree to pay his standard fee of $150.00 per hour (to include travel time), plus expenses.

I further recognize that Mr. Gilbert has still not been paid his bill for the approximately $16,000+ for his efforts on my behalf before the Oklahoma Supreme Court, in Appeal 100,697. I recognize and

ratify once again that bill, and I agree to sign such documents and make such statements as Mr. Gilbert believes will facilitate his payment of that as-yet unpaid bill.

In effect, by this instant Contract, I am ratifying and re-executing my previous contract with Mr. Gilbert, of May 10, 2004.

And notwithstanding the execution of this instant contract, I do invite Ms. Julia Neftzger to serve as co-counsel on my behalf.

/s/ Mary Marie Sweetin
MARY MARIE SWEETIN
Date: [Illegible]
2 17 05

ACCEPTED:

/s/ Fred Gilbert
FRED GILBERT
Date: 17 Feb 2005

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

| | |
|---|---|
| IN THE MATTER OF THE CONSERVATORSHIP OF GLENN O. YOUNG. | |
| GLENN O. YOUNG, Appellant, | No. 64,460 |
| vs. | NOT FOR PUBLICATION |
| THE AMERICAN NATIONAL BANK AND TRUST COMPANY OF SAPULPA, Appellee. | |

APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY, OKLAHOMA

Honorable J.M. LeMasters, Jr., Trial Judge

L.G. Hawkins
Hawkins & Associates
Tulsa, Oklahoma

Fred P. Gilbert
Head, Johnson & Stevenson, P.A.
Tulsa, Oklahoma — For Appellant

Sam T. Allen, III
Loeffler & Allen
Sapulpa, Oklahoma — For Appellee

## SUMMARY OPINION

RAPP, J.

Trial court conservatee, Glenn O. Young, appeals the trial court's decision overruling his motion to remove the defendant, American National Bank and Trust Company of Sapulpa, as the conservator of his estate. We reverse and remand.

I

Members of Young's family, in February 1984, filed a petition with the district court requesting the appointment of Young's wife as conservator of his estate. This petition was dismissed on May 21, 1984, due to lack of prosecution. The district court subsequently, after an appeal to the supreme court, reinstated the petition by vacating its dismissal order. The record discloses no additional action taken on this petition.

During the period between the petition's dismissal and its reinstatement, Young, in late 1984, executed a limited power of attorney to his son, Ulrich, and simultaneously attempted to unilaterally appoint Ulrich conservator of his estate. Then, on December 31, 1984, Young and Ulrich jointly filed a motion which requested that the defendant, American, be appointed conservator and terminated Young's attempt to appoint Ulrich conservator. Young's original voluntary petition stated he was almost blind and unable, without assistance, to manage his affairs. American was appointed conservator in accordance

with Young's voluntary petition without statutory bond being posted to the State of Oklahoma as required under 58 O.S.1981 § 890.4.[1]

American, following its appointment as conservator to assist Young in the management of his estate, apparently breached its agreement with Young to "assist" him and refused to provide him with an agreed income of $2,500 per month, even though the record indicates it collected monies on his behalf in excess of $10,000 per month.

American, for whatever reason undisclosed in the record, decided after its appointment to be a true statutory conservator, even without the bond, managing

---

[1] Glenn O. Young is a senior member of the bar of at least 90 years of age at the time he filed his voluntary petition for assistance in the management of the affairs of his estate. The estate had extensive realty and ranch lands, oil royalties, and an income of at least $10,000 per month. Young apparently had entered into an agreement with American to be his assistant. No party, family, friends, or attorneys questioned his ability or competency to request or receive such assistance via the assistance of American. Moreover, such a request appears to be logical, for if one cannot see, he cannot read! Such a request does not imply the inability to reason or understand the nature and requirements of his estate, nor does it imply any form of physical or mental incapacity. In fact, no challenge of this nature was made, and the court acceded to Young's petition and perfunctorily granted this request. Apparently, the petitioner and parties only contemplated assistance and a modified or limited form of conservatorship, evidenced by the court's failure to require bond to the State of Oklahoma under 58 O.S.1981 § 890.4, which the court cannot waive if a full conservator is appointed.

all assets of the estate, including seeking and receiving from the court writs of assistance to obtain records from Young's office. American, during this process, attempted to sell Young's registered Charolais cattle, farm equipment, and portions of real estate. Young and some members of his family objected. The net effect of American's actions were to cause Young, at his age, to be deprived of income and ability to provide for himself, even with his income and estate in excess of a million dollars.

Less than ninety days after American's appointment, Young filed his petition requesting its removal. Young alleged in his petition that American, as conservator, was wasting assets, failed to provide for his needs, and in effect failed to act in his best interest, causing him damage, and that the need for the conservatorship had ended.[2]

---

[2] Young, by his testimony and admitted by American, stated American, among other items, had failed to provide him $2,500 per month, as agreed, and failed to provide him counsel in his divorce proceeding in Lincoln County. American did not dispute this but rather argued the court only "authorized" payment of $2,500 per month and that it was not required to give Young this amount from his own funds. Further, while arguing Young was incapable of having his own counsel while under guardianship, American acknowledged it did not provide him counsel in the divorce until a period in excess of at least ninety days. It also admitted at the hearing it had not taken an inventory of the Young ranches, nor did it even know the number of oil wells, but did know the rate of its fee for managing such assets. Such allegations levied against the institution which had agreed to be Young's assistant in the management of

(Continued on following page)

The court scheduled a hearing for these proceedings the fourth day after filing and allowed Young thirty minutes to present his case. The court rigorously enforced its thirty-minute limitation, including within this time limit the questioning of counsel involved in the Young divorce proceeding. The court terminated Young's testimony at the end of thirty minutes and denied Young the testimony of his accountant. He made an offer of proof that his accountant of over thirty years would testify that his financial and tax affairs and credit were in excellent condition prior to the conservatorship, and that financing was available to Young without the conservator, but not with one.

The bank, after vigorously resisting its removal as conservator, not denying any of Young's allegations and testimony, entered its demurrer, which was sustained without testimony. The court later, in its journal entry, showed Young's motion to have been overruled without any findings. Young appeals.

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his affairs, as a minimum, required a hearing designed to dispel any hint of wrongdoing or self-serving management of his assets, for as long recognized, "No person holding a position of trust can he heard in court to assert that the emoluments which may come from his continuance in the execution of the trust constitute a personal interest against the interests of those otherwise concerned in the trust." *Ensign v. Faxon*, 112 N.E. 948, 950 (Mass. 1916).

II

Young in effect alleges error in denying him fundamental due process by depriving him of the right to be heard and right of access to the court.

The trial court's denial of Young's right to present his case under the record here presented constitutes an almost total disregard of his constitutional right to be heard and cannot and will not be tolerated.

Each person has the right of access to the courts and the right to be heard, particularly where the refusal, in effect, deprives one of his liberty[3] and, above all, his right to a fair and impartial hearing. Here, the trial court's unprecedented restriction upon Young's right to present a case, such as here involved, is an almost per se denial of a fair and impartial hearing and the right to be heard. Due process, so long fought for, has clearly established that the right to be heard must occur "at a meaningful time and in a

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[3] Young voluntarily asked for "assistance" and obviously is receiving more than either he or the court expected, evidenced by its non-requirement of bond. American has, by its actions, gone from "assisting" to the position that all of Young's assets belong to it, which it does under a fully appointed conservatorship. American, by its actions of sending out notices to creditors, resisting its discharge as conservator, curtailing his income, and attempting to control his legal affairs by assertion he has no standing in court except to challenge the conservatorship, in effect clearly restrains and frustrates an active member of the bar as effectively as if it used physical restraint, probably even more so due to the physiological factors involved, coupled with his age.

meaningful manner," *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965), and within "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

In further dealing with the right of access and the right to be heard, both functions of due process, we note from the transcript of these proceedings that counsel for Young's estranged wife were urging upon the court in a matter heard immediately preceding this action that, since Young was a ward under a conservatorship, he had no right to bring the action except by representation of his counsel. This same argument is picked up and briefed to this court by American in some detail in defense of this appeal.

American concedes that an incompetent may independently obtain counsel, challenge a guardianship, and obtain restoration of competency. It also concedes the ward of a conservator may challenge the need for a conservatorship. However, American asserts the ward or conservatee may do nothing further, and, in particular, that Young is without standing to appeal any order concerning the management of the estate.[4] We disagree.

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[4] It would appear there has at best occurred a misunderstanding between the parties concerning the role American was to play. This failure to communicate and reach a meeting of the minds would perhaps best be solved by a general accounting and American's resignation as conservator. American's continued existence and reluctance to perform, resulting in continued and continuing litigation and expenditure of assets by litigation,

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The short answer to the above contention is that a ward under conservatorship has only two incapacities as to the conservator – the ward may not, under 58 O.S.1981 §§ 890.5 and 890.9, manage the property, nor may the ward obligate the estate by contract, under 58 O.S.1981 § 890.10. Thus, it is obvious the ward is not barred from seeking redress before the court of alleged wrongs on the part of the conservator.

The ward of a conservatorship, particularly one entered into voluntarily, where there has been no question of competency, has the right to expect and request an accounting, notice of all actions which will affect the value and management of the estate, and the opportunity of access to the courts to challenge the reasonableness and best interests of such actions. The ward in such event has the right to retain independent counsel and to have such counsel reimbursed from the assets of the estate where the ward prevails or from the conservator or its bond if it is established its actions were performed negligently, in bad faith, or for self-dealing.

Finally, we note the trial court's order on Young's motion made no finding that continuation of the conservatorship is necessary, nor did the trial court, in sustaining American's demurrer,[5] "consider as true

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raise serious questions as to its good faith and whose best interests are being served.

[5] Based on the record and apparently large numbers of communications addressed to the court by Young, it is

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all the evidence favorable to the party against whom the demurrer . . . is directed . . . and should disregard all conflicting evidence favorable to the demurrant." *Hampton v. Danks,* 387 P.2d 609, 613 (Okla. 1963) (quoting *Bryan v. Hough*, 365 P.2d 124 (Okla. 1961)). Young presented evidence his financial condition could benefit by removal of the conservator and that the conservatorship was no longer necessary.

In short, the trial court erred.

III

The case is remanded with instructions to allow Young to present such evidence, subject to the rules of evidence, as counsel deems necessary to fairly present Young's allegations, for which he shall be entitled to full access of all records of the estate held by American, including all records and correspondence of American dealing with Young, his estate and affairs, and to grant him such relief to which he may be entitled. Conservatee's motion for oral argument is denied.

BRIGHTMIRE, P.J., and BACON, J., concur.

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understandable how the requirement of the court's impartiality could suffer. Accordingly, upon remand, the court should strongly consider recusing itself to allow the unquestioned appearance of a fair and impartial hearing.